Petition

FILED
OCT 16 1981
ALEXANDER L. STEVAS
CLERK

81-540

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No. .....

SOUTH PARK INDEPENDENT SCHOOL DISTRICT,

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

I.

Whether the Court of Appeals erred in holding that, as a matter of law, a formerly segregated school system has not achieved a constitutiona! unitary system unless and until it has established statistical racial balance in every aspect of its operation, regardless of the cause of any existing imbalance.

II.

Whether a school district that has fully complied with a court-ordered plan requiring establishment of a unitary school system and committed no further constitutional violation may, nonetheless, several years later constitutionally be required to adopt a different plan in order to increase school racial balance.

III.

Whether the provision of the Equal Educational Opportunity Act of 1974 (20 U.S.C. 1758) that no order shall be entered, as a remedy for a denial of equal educational opportunity or for denial of equal protection of the laws, requiring enforcement of a desegregation plan or modification of a court-approved plan, until the school district has been provided notice of the details of the violation, may be complied with by a notice to the school district that, in effect, states no more than that some racially imbalanced schools continue to exist.

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Petitioner South Park Independent School District respectfully prays that a writ of certiorari issue from this Court to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit is reported at 647 F.2d 504. It is reproduced as Appendix A hereto. The opinion of the District Court for the Eastern District of Texas, not reported, is reproduced as Appendix B hereto. The opinion of the District Court on remand, not reported, is reproduced as Appendix C hereto.

JURISDICTION

The judgment of the Court of Appeals was entered on May 28, 1981. A timely petition for rehearing or rehearing *en banc* was denied on June 19, 1981, and this petition was filed within ninety days of that date, stay of mandate having been denied. Appendices E. and F. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1). Notice of appeal has been timely filed, and reproduced as Appendix G hereto.

QUESTIONS PRESENTED

I.

Whether the Court of Appeals erred in holding that, as a matter of law, a formerly segregated school system has not achieved a constitutional unitary system unless and until it has established statistical racial balance in every aspect of its operation, regardless of the cause of any existing imbalance.

II.

Whether a school district that has fully complied with a court-ordered plan requiring establishment of a unitary school system and committed no further constitutional violation may, nonetheless, several years later constitutionally be required to adopt a different plan in order to increase school racial balance.

III.

Whether the provision of the Equal Educational Opportunity Act of 1974 (20 U.S.C. 1758) that no order shall be entered, as a remedy for a denial of equal educational opportunity or for denial of equal protection of the laws, requiring enforcement of a desegregation plan or modification of a court-approved plan, until the school district has been provided notice of the details of the violation, may be complied with by a notice to the school district that, in effect, states no more than that some racially imbalanced schools continue to exist.

STATEMENT OF THE CASE

Petitioner South Park Independent School District encompasses a densely populated area that includes part of the City of Beaumont, Texas, and an adjoining area. In 1970, when this litigation began, petitioner operated twenty schools (three high schools, four junior high schools, and thirteen elementary schools) with over 13,000 students, of whom approximately 32 percent were black. Since that time, enrollment has steadily declined to less than 10,000 students, 39 percent of whom are black, based on 1981-82 enrollment figures. "Clearly, the students leaving the school system are white. There has been a greater number of departures in each year that a court order has been handed down. The lines have been long at the local private schools in anticipation of the order, and most are reported to be at capacity this fall." App. C. 5.

1. The district court's 1970 decision and order.

The Attorney General of the United States began this action in 1970 by filing a complaint pursuant to the 1964 Civil Rights Act (42 U.S.C. § 2000c-6(a) and (b)).[1] At that time petitioner was operating pursuant to a freedom of choice plan. After a hearing and the submission of desegregation plans by the parties, the district court on August 31, 1970 entered an order for "the immediate implementation of a school integration plan designed to establish a unitary school system in the South Park Independent School District." R. 62.

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[1] Section 407 of the Act (42 U.S.C. 2000c-6(a)) authorizes the Attorney General to institute "desegregation" actions. Section 401 (42 U.S.C. 2000c(b)) provides:

> "Desegregation" means the assignment of students to public schools and within such schools without regard to their race, color, religion, sex or national origin, but "desegregation" shall not mean the assignment of students to public schools in order to overcome racial imbalance.

The district court's 1970 order specifically set forth the required attendance zone boundaries for each of petitioner's schools and required petitioner to adopt and implement a majority-to-minority transfer policy, allowing free student transfers where the effect would be to increase integration, with the required transportation to be provided by the school district whenever possible and with space to be made available to transferring students on a priority basis. The court also ordered petitioner to assign faculty and staff so that "the ratios of black to white teachers and staff in each district school are substantially the same as the present district-wide ratio of faculty and staff, allowing a five (5%) tolerance factor." R. 68.

The district court's 1970 order became final upon the failure of either party to take an appeal.

2. The government's challenge to the 1970 order.

Almost six years later, by letter of April 15, 1976, the Civil Rights Division of the Department of Justice advised petitioner that it "believe[d] that additional steps need to be taken in order to bring the district into compliance with federal law." R. 103. The basis for this belief was stated to be that "Information presently available to this office indicates that the desegregation anticipated under court order has not materialized, and that in fact there are now six schools in the district which are over 85% black. In addition, there are presently six public schools in the system which enroll over 90% white students." R. 104.

This was the first indication by any agency of the United States of any dissatisfaction with the operation of the school district since 1970. For each academic year since 1970, the Department of Health, Education and Welfare had certified that the school district was operating in compliance with the requirements of the 1964 Civil Rights Act. R. 401.

By letter of June 24, 1976, petitioner replied that it had operated and was operating in full compliance with the district

court's 1970 order. R. 109. In July, 1976, the government filed a "Motion for Supplementary Relief" in the district court, requesting "an order requiring the South Park Independent School District to develop, adopt and implement a comprehensive school desegregation plan which fully satisfies the requirements of the United States Constitution." R. 75.

The government did not allege that petitioner was not in full compliance with the district court's 1970 order or that the government had received any complaint from any student or parent in the school district regarding the school district's operation. The government relied instead solely on a statistical showing of school racial imbalance. R. 79-81.

Petitioner opposed the government's motion on the grounds, among others, that petitioner was in full compliance with the court's 1970 order and that to the extent that the integrative effects of the court's order differed in any way from those expected in 1970, it was the result of population movements beyond petitioner's control. A motion to intervene was filed by a group called Freedom of Choice, composed of some 1,500 parents and students in the school district, also urging that the government's motion be denied. R. 115.

Hearings were held in August, 1976, at which only petitioner offered the testimony of witnesses. On September 9, 1976 the district court entered its opinion and order, with findings and conclusions, denying the government's motion. At the same time, the court granted, in open court, the motion of the Freedom of Choice group to intervene for the purposes of any appeal. No. 76-3669, Record on Appeal, Vol. II, p. 128.

3. The district court's 1976 decision.

The district court denied the government's motion for supplementary relief on two grounds. First, the court found that petitioner had "fully complied with this Court's order of August 31,

1970, from date of entry to the present" and that the government "has failed to establish that the integration order entered by this Court on August 31, 1970, is constitutionally flawed." R. 403. The court noted that "the Department of Health, Education and Welfare, an agency of plaintiff charged with such responsibility, has approved student integration procedures in defendant district in each academic school year from entry of the Court's order to the present, and, prospectively, for academic school year 1977-78." R. 401. The court further found that "while specific desegregative effects" anticipated in the 1970 order "may not have been fully realized," "the overall, district-wide desegregative effects of that order have been greater than were anticipated" and that any differences were "the result of shifting residential patterns, attendance of some district students at private schools, and other factors beyond the control of defendant. . . ." R. 401. Finally, the district court found:

> Since entry of this Court's order of August 31, 1970, defendant district has taken no affirmative action with segregative intent, nor has it deliberately refrained from taking any affirmative action within the scope of such order which, if taken, would have increased desegregative results. Student assignments to individual classes at South Park High School and in the other schools of defendant district have consistently been made without regard to race, color or national origin, and the method of student class assignment employed by defendant has had a definite desegregative effect.

R. 401-402.

Second, the district court denied the government's motion for supplementary relief on the ground that the government had failed to comply with the notice requirement of Section 259 of the Equal Educational Opportunity Act of 1974, 20 U.S.C. § 1758. Section 259 prohibits federal courts from ordering modification of a court-approved desegregation plan until the school district has been provided "notice of the details of the

violation" alleged, *i.e.*, "a denial of equal educational opportunity or a denial of equal protection of the laws," and given an opportunity to develop a voluntary plan and time to permit community participation in the development of a new plan The court held:

> Plaintiff has failed to satisfy the requirements of 20 U.S.C.A. 1758 with respect to providing notice to defendant district of the details of any violation of equal educational opportunity or of equal protection of law. Thus, defendant has not been given a reasonable opportunity to develop a voluntary remedial integration plan with time for community participation therein. Accordingly, this Court is prohibited under the provisions of 20 U.S.C.A. 1758 from granting plaintiff's motion for supplementary relief.

R. 402.

4. The court of appeals' 1978 decision.

On appeal by the government, the Court of Appeals for the Fifth Circuit reversed the district court's 1976 decision. *United States* v. *South Park Independent School District*, 566 F.2d 1221 (1978). The court of appeals found that "at no time prior to the 1976 order presently under attack, had a finding been made by the district court as to the attainment of a 'unitary' system by the SPISD," and that "given these circumstances, the parties are bound by the intervening opinions of the Court of Appeals and the United States Supreme Court" which, the court believed, outlined "new guidelines and requirements" for school desegregation cases. *Id.* at 1225. Under this Court's decision in *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971), the court of appeals held, the "existence of one-race schools" made it "necessary to remand this case to the district court for supplemental findings of fact in order to determine whether or not the SPISD is in fact a 'unitary' school system." 566 F.2d at 1225.

The court of appeals also held that Section 259 of the Equal Educational Opportunity Act of 1974 (20 U.S.C. 1758) "is not

controlling," because "No judicial ruling had been made concerning the attainment of a 'unitary' system." 566 F.2d at 1226. In any event, the court said, the Development of Justice's letter of April 15, 1976 complied with the notice requirement of Section 259 because that letter advised that "the Department felt additional steps necessary to bring the district into compliance with federal law," "pointed out ... that the one-race, or predominantly one-race, status of twelve of the district's schools was the primary concern of the government," and "explained that the Department of Justice felt that the particular feeder pattern of elementary to junior high to senior high schools used by the school district was the chief cause for these one-race schools." *Ibid.* The court of appeals, therefore, was "unable to see how the government could have better complied with the notice provisions of the statute." *Ibid.*

A petition by the school district for a writ of certiorari was denied by the Court on December 4, 1978, Justice Rehnquist dissenting in an opinion joined by Justice Powell. 439 U.S. 1007.

5. The district court's decision on remand.

On remand, further evidentiary hearings were held from December 3-6, 1979. Forty-nine witnesses testified. On June 6, 1980, the district court entered its opinion and order, again denying the government's motion for supplementary relief. The court again found that petitioner school district was unitary in all respects and that the government had failed to comply with the notice requirement of Section 259 of the Equal Educational Opportunity Act of 1974.

The district court again found that petitioner had fully complied with the court's 1970 order, from which the government had not appealed, requiring by its explicit terms "the immediate implementation of a school integration plan designed to establish a unitary school system in South Park Independent School District." App. B. 8. "The evidence presented at both the 1976 and the 1979 hearings clearly established," the court found, "that no

action or inaction by the District since the entry of the desegregation Order had, as a natural and foreseeable consequence, a segregative effect on the student body within any school or the District" and that "Indeed, there was evidence presented during the 1979 hearing which established that the District had taken several steps to increase the overall level of student desegregation." App. B. 12-13. Petitioner had acted to increase integration, for example, by rotating its secondary school summer program among the district's three high schools, by promoting the majority-to-majority transfer option in local newspapers and in the schools, and by the scheduling of different vocational, language, and other courses in the three high schools. App. B. 13.

On the basis of expert testimony, the district court found that the difference between the racial composition of certain schools in 1979 and the racial composition contemplated by the 1970 order was due solely to changes in residential patterns in the nine-year period; the mass exodus of white students from some school attendance zones; a continuing decline in total school enrollment with almost 10 percent increase in the proportion of black students; and the decision of some students to attend private schools. App. B. 11-12. For example, two densely populated areas changed from predominantly white to predominantly black, affecting the racial composition of two elementary schools, a middle school, and a high school. App. B. 12. "Clearly," the Court found, "that certain schools are currently attended by students of predominantly one race is not the result of present or past discriminatory action by the District or by Texas." App. B. 11.

The district court also reiterated its earlier holding — which it believed the court of appeals had misunderstood — that the government's motion for supplementary relief had "failed to provide notice to the SPISD of the details of any violation of equal educational opportunity or equal protection of the laws as

required by section 259 of the Equal Educational Opportunity Act of 1974." App. B. 16. The court therefore found itself "foreclosed by the language and intent of the Act from 'enter[ing] . . . any order for . . . modification of [the] court-approved plan.' 20 U.S.C. § 1758." App. B. 16-17.

6. The present decision of the court of appeals.

On a second appeal by the government, the court of appeals again reversed the district court's decision that petitioner's school system is unitary. Although it purported to recognize that under Federal Rule of Civil Procedure 52(a) the factual findings of a district court may not be set aside unless found to be "Clearly erroneous," the court of appeals did not disapprove or even specifically review the district court's factual findings. For example, the court of appeals did not question the district court's finding that the racial composition of petitioner's schools "is not the result of present or past discriminatory action by the District or by Texas." The court of appeals this time based its reversal, instead, on a legal theory that made the district court's findings irrelevant. Under this Court's decision in *Green* v. *County School Board of New Kent County*, 391 U.S. 430 (1968), the court of appeals held, the existence of a unitary system depends on "six criteria: faculty, staff, student bodies, facilities, extracurricular activities and transportation" and that, as a matter of law, "in order to achieve a unitary status the school district must be fully integrated in all six respect. *Id.*, at 435." App. A. 4-5. "The most telling evidence introduced in this case" on the issue of whether petitioner has achieved a unitary system, the court of appeals therefore found, "is the attendance figures for the district schools." App. A. 4. "Here," the court said, "the simple numerical evidence of student enrollment reflects the effect or lack thereof, of the desegregation plan." App. A. 6. In sum, the court of appeals held that as a matter of law petitioner can not have achieved a unitary system, despite the factual findings of the district court, because petitioner has not achieved numerical

racial balance in all aspects of the school system, regardless of the source of the existing imbalance.

The court of appeals also reversed again the district court's finding that the government's motion for supplementary relief must be denied because of the government's failure to comply with the notice requirements of the Equal Educational Opportunity Act of 1974. Without considering the district court's further statement of its findings and holding on this issue, the court of appeals reversed that holding on the basis of "the doctrine of the law of the case." App. A. 3.

A petition for rehearing or rehearing *en banc* was denied by the court of appeals on June 19, 1981. A motion for stay pending disposition of this petition for certiorari was denied by the court of appeals on June 29, 1981 and by Justice Powell, with written opinion (attached hereto as Appendix D), on June 21, 1981.

On remand the district court found that the court of appeals "appears to have relied exclusively of statistics" (App. C. 2) and that "the law has progressed from a concept of desegregation to a concept of integration." *Id.* p. 7. Rejecting all plans submitted by the parties and intervenors, the court adopted a system of assignment by lottery for all students, beginning with the fourth grade for most students and with the sixth grade for the remainder. At the election of black intervenors, petitioner is also required to implement an "experimental program" at selected schools; "the entire student body of the selected school shall be black and all teachers and administrators assigned to the experimental school shall be black." App. C. 19.

Reasons for Granting the Writ

The decision of the Court of Appeals for the Fifth Circuit in this case squarely presents for decision the central issue in contemporary school desegregation litigation: whether, as the district court put it on remand, "the law has progressed from a concept of desegregation to one of integration." The court of

appeals has held that, as a matter of law, a formerly segregated (dual) school system has not achieved a constitutional desegregated (unitary) system unless and until the system is "fully integrated" — statistically racially balanced — in all respects, regardless of the cause of any remaining racial imbalance. The result, of course, is, not to require desegregation, the remedying of unconstitutional segregation, but to create an independent constitutional requirement of integration or racial balance for its own sake. Illustrating the resulting confusion, the district court on remand stated, "While the Fifth Circuit has made little pretense in this regard, the Supreme Court has avoided adopting the principle in so many words." App. C. 7. In fact, however, the court of appeals' decision is in direct conflict with the applicable decisions of this Court.

This case also presents in unusually clear-cut form the constitutional question of greatest importance to school districts across the nation operating pursuant to court-adopted desegregation plans: whether they, despite full compliance with a court-ordered plan and the absence of any constitutional violation since the date of the order, must submit to periodic demands for restructuring in order to increase school racial balance and overcome the effects of residential racial concentration, population movements, the withdrawal of students, and other factors beyond the power of school authorities to control. The court of appeals' decision on this question is also in direct conflict with the applicable decisions of this Court.

Finally, this case presents an important question of federal statutory law that was almost certainly decided wrongly by the court of appeals and that, as a case of first impression, requires resolution by this Court: the meaning of a major provision of the Equal Educational Opportunity Act of 1974 (20 U.S.C. 1758), Congress' principal attempt to provide guidance on desegregation issues of overwhelming national concern. According to the court of appeals' interpretation, a provision of the Act meant to

limit or prevent unnecessary, repeated upheavals of school districts was found to have little or no more effect than if it had never been enacted.

As stated by Justice Powell, "the case in its present posture merits review by the Court." App. D. 3.

I. The Court of Appeals Erred in Holding that Petitioner's School System Is not Unitary, Despite the Contrary Finding of the District Court, Because Petitioner Has Not Achieved Numerical Racial Balance in Every Aspect of the System.

The district court has twice found that petitioner has achieved and maintains a unitary —desegregated, nonracial — school system. The court of appeals has twice reversed this finding, basing its reversals on different grounds. In 1976 the district court found that petitioner had achieved a unitary system in that it had fully complied with the court's 1970 order requiring and specifying a unitary system, which order was found to have had the anticipated desegregative effects in the system as a whole with any differing effects in particular schools being the result of factors beyond petitioner's control. In 1977 the court of appeals reversed the district court's finding of a unitary system on the ground that under this Court's decision in *Swann* v. *Charlotte-Mecklenberg Board of Education*, 402 U.S. 1 (1971), as the court of appeals understood it, the existence of some one race schools made additional findings by the district court necessary.

After holding four days of additional evidentiary hearings and taking testimony by expert witnesses on demographic factors responsible for the racial composition of petitioner's schools, the district court again found that petitioner had achieved a unitary system. "Clearly," the court concluded, "that certain schools are currently attended by students of predominantly one race is not the result of present or past discriminatory action by the District or by Texas." App. B. 11. In its present decision, the court of appeals again reversed the district court, but this time on the basis of a new and much more far-reaching legal theory which

the court now derived, not from *Swann*, but from this Court's pre-*Swann* decision in *Green* v. *County School Board of New Kent County*, 391 U.S. 430 (1968). Under this theory, the court of appeals held, petitioner can not have achieved a unitary system because it has not achieved numerical racial balance in every aspect of the system's operation. The district court's finding of a unitary system was now reversed, therefore, not because the district court's findings as to the cause of existing racial imbalance are insufficient, but because such findings are irrelevant.

The court of appeals has left no doubt as to its understanding of the applicable law or the basis of its reversal of the district court. In *Green*, the court of appeals stated, this Court "enunciated six criteria: faculty, staff, student bodies, facilities, extra-curricular activities and transportation" for the determination of whether a school system is unitary and held that "in order to achieve a unitary status the school district must be fully integrated in all six respects. *Id.*, at 435." App. A. 4-5. Applying this view of the law, the court of appeals found that the "most telling evidence introduced in this case" on the issue of whether petitioner's school system is unitary is simply "the attendance figures for the district schools" (App. A. 4) and no more than "simple numerical evidence of student enrollment" showing racial imbalance in some schools was necessary to show that the district court had erred in finding the system unitary. As the district court stated on remand, the court of appeals "appears to have relied exclusively on statistics." App. C. 2. As stated by Justice Powell, "The Court of Appeals, relying exclusively on statistics comparing 1969 and 1979, rejected with little explanation the District Court's finding of fact that the implementation of the consensual 1970 plan had created a unitary school system. . . ." App. D. 3-4.

The court of appeals' understanding of *Green* and this Court's later desegregation decisions is clearly incorrect. In *Green* this

court did not, of course, "enunciate six criteria" for determining whether a school system is unitary and hold that a system can not be unitary unless it is "fully integrated in all six respects." On the page of the *Green* opinion cited by the court of appeals (391 U.S. at 435) this Court described the factual situation then existing in the New Kent County school system. "Racial identification of the system's schools was complete," this Court said, just as before *Brown*, "extending not just to the composition of student bodies at the two schools but to every facet of school operations — faculty, staff, transportation, extracurricular activities and facilities." Far from holding that a formerly segregated system can not be found unitary unless it is "fully integrated in all six respects," the Court made clear that the only constitutional requirement is the requirement of *Brown*: to make "clear that state-imposed segregation has been completely removed." 391 U.S. at 439.

The district court on remand is clearly correct that the court of appeals "has made little pretense" that it equates desegregation with integration, but the district court is mistaken that this is a correct statement of the law and that this Court has "avoided adopting the principle" of the court of appeals only "in so many words." App. C. 7. In *Swann, supra*, 402 U.S. at 22-23, this Court's fullest exposition of the nature and extent of the desegregation requirement, the Court emphasized:

> We are concerned in these cases with the elimination of the discrimination inherent in the dual school systems, not with myriad factors of human existence which can cause discrimination in a multitude of ways on racial, religious, or ethnic grounds. The target of the cases from *Brown I* to the present was the dual school system. The elimination of racial discrimination in public schools is a large task and one that should not be retarded by efforts to achieve broader purposes lying beyond the jurisdiction of school authorities. . . .
>
> Our objective in dealing with the issues presented by these cases is to see that school authorities exclude no pupil

> of a racial minority from any school, directly or indirectly, on account of race; it does not and cannot embrace all the problems of racial prejudice, *even when those problems contribute to disproportionate racial concentrations in some schools.*

(Emphasis supplied). Contrary to the holding of the court of appeals in this case, this Court made clear in *Swann* that there is no "substantive constitutional right [to] any particular degree of racial balance or mixing." 402 U.S. at 24. Desegregation, *Swann* reiterated, is a *remedy* for *de jure* segregation, the constitutional violation, and, "As with any equity case, the nature of the violation determines the scope of the remedy." *Swann*, 402 U.S. at 16.

In *Spencer* v. *Kugler*, 404 U.S. 1027 (1972), one year after *Swann*, this Court squarely held that the constitutional requirement of desegregation is *not* to be equated with a requirement of integration or racial balance. In *Milliken* v. *Bradley*, 418 U.S. 717, 740-41 (1974), the Court, reversing lower court decisions requiring increased integration, reiterated that "desegregation, in the sense of dismantling a dual school system, does not require any particular racial balance in each 'school, grade or classroom.' See *Spencer* v. *Kugler*, 404 U.S. 1027 (1972)." Because desegregation is a remedy for unconstitutional segregation, not an independent requirement of integration, it is "necessarily designed, as all remedies are, to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct." *Id.* at 746. The purpose of a desegregation decree, the Court stated in *Dayton Board of Education* v. *Brinkman*, 433 U.S. 406, 420 (1977), is to remove the "incremental segregative effect" of the constitutional violations found and, therefore, must be designed, not simply to create racial balance as the court of appeals here found, but to make the "racial distribution of the . . . . school population . . . . what it would have been in the absence of such constitutional violations."

The government has not alleged, the court of appeals has not purported to find, and there is no reason to believe that petitioner's school system would today be "fully integrated" in every respect except for the unconstitutional segregation that ended more than a decade ago. The district court has found — and the court of appeals has not questioned the finding — that the racial imbalance existing in petitioner school district "is not the result of present or past discriminatory action by the District or by Texas." App. B. 11. The court of appeals' requirement that petitioner create a totally racially balanced school system cannot, therefore, be justified as a constitutional requirement of desegregation.

Whether or not the creation or attempt to create racially balanced school systems by compulsion of law is good social policy, it is not, under this Court's decisions, a constitutional requirement. The court of appeals clearly erred in holding otherwise.

II. Having Fully Complied with a Court-Ordered Desegregation Plan Requiring a Unitary System, the School District Cannot Constitutionally be Required to Adopt a Different Plan in Order to Increase School Racial Balance and Overcome the Effects of Residential Racial Concentration, Population Movements, Student Withdrawals, and Other Factors Beyond the School District's Control.

In 1970 the district court, on suit by the government, ordered petitioner to undertake "the immediate implementation of a school integration plan designed to establish a unitary school system" and set forth the specifics of the required plan in detail. R. 62. The district court has twice found that petitioner has fully complied with this order[2] and, indeed, that petitioner has "taken

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[2] At the first hearing in 1976 on the government's motion for supplementary relief, the following exchange took place:

THE COURT: All right, I would inquire of counsel for the Government whether or not you are making the contention that

several steps to increase the overall level of student desegregation" beyond the steps required by the order. App. B. 12-13. Finally, the district court found that the 1970 order has had the overall desegregative effects anticipated in 1970 and that any differing specific effects are due to factors beyond petitioner's control. These findings, we submit, are fully sufficient in themselves to support the district court's conclusion that petitioner has achieved a unitary system. The court of appeals erred, therefore, in reversing the district court's conclusion without holding clearly erroneous, as required by Federal Rule of Civil Procedure 52(a), any of the district court's findings upon which it was based.

Having ordered the petitioner in 1970 to implement immediately a specific desegregation plan which the district court had determined would achieve a unitary system, completely extirpating the effects of compulsory segregation; having found that petitioner fully complied with that order; and having found that overall the plan had more than accomplished the anticipated desegregative effects, the district court had no choice but to hold that petitioner had achieved a unitary system. The district court could not have held otherwise except by repudiating its own 1970 order from which no appeal had been taken. To

---

the School District in some way has failed to comply with the court's order of August 31, 1970.

MR. JENNINGS [government counsel]: No, sir, we are not contending that they have failed to comply . . .

THE COURT: Now the Court would inquire — the Court doesn't wish to embarrass counsel, because maybe you had nothing to do with it at the time, but if you feel this way now, at the time you filed the motion, do you know why the Government did not feel that way in 1970, in taking an appeal from the Court's order of August 31, 1970?

MR. JENNINGS: I can't answer that.

THE COURT: You have no answer to that?

MR. JENNINGS: No, sir.

App. B. 14.

have held that the school district had not achieved a unitary system would have been to hold that its own orders may not be relied upon by a school district, and that school desegregation litigation can have no end.

This Court has made very clear that desegregation, the achievement of a unitary system, does not require continuous steps to counteract population movements. As the Court stated in *Swann* v. *Charlotte-Mecklenberg*, 402 U.S. 1, 31-32 (1971):

> At some point, these school authorities and others like them should have achieved full compliance with this Court's decision in *Brown I*. The systems will then be "unitary" in the sense required by our decisions in *Green* and *Alexander*.
>
> It does not follow that the communities served by such systems will remain demographically stable, for in a growing, mobile society, few will do so. Neither school authorities nor district courts are constitutionally required to make year-by-year adjustments of the racial composition of student bodies once the affirmative duty to desegregate has been accomplished and racial discrimination through official action is eliminated from the system . . . [I]n the absence of a showing that either the school authorities or some other agency of the State has deliberately attempted to fix or alter demographic patterns to affect the racial composition of the schools, further intervention by a district court should not be necessary.

The point at which a school district has most clearly achieved compliance with *Brown I* and a unitary system is, we submit, the point where, as here, it has fully complied with a court-ordered plan requiring and establishing a unitary system. A school district's affirmative duty to desegregate has then surely been accomplished, and federal courts may not thereafter order adjustments in the racial composition of student bodies every six years any more than they may order year-by-year adjustments.

This Court's decision in *Pasadena City Board of Education* v. *Spangler*, 427 U.S. 424 (1976) is to the same effect. In *Pasadena*, as here, unconstitutional school segregation had been

found in the past, and in 1970 a plan had been ordered by the district court to achieve a unitary system. After the Pasadena School Board had complied with the order for four years, the district court issued a further order, affirmed by the court of appeals, requiring the school district to adopt a different plan in order to eliminate the predominantly black schools. In *Pasadena*, again as here, the Court did not have before it "any issue as to validity of the District Court's original judgment," since no appeals had been taken from it. Reversing the court of appeals, the Court held that the district court's further order was not constitutionally required or justified:.

> For having once implemented a racially neutral attendance pattern in order to remedy the perceived constitutional violations on the part of the defendants, the District Court had fully performed its function of providing the appropriate remedy for previous racially discriminatory attendance patterns.

427 U.S. at 436-37.

As Justice Rehnquist, joined by Justice Powell, stated in dissent from the denial of petitioner's earlier petition for a writ of certiorari (439 U.S. 1007, 1011):

> The thrust of *Swann* and *Pasadena*, when taken together, is that a district court must heed the *Swann* mandate to closely scrutinize predominantly one-race schools when approving an *initial* desegregation plan in a school district with a history of *de jure* segregation, but that the District Court has no obligation, indeed, has no authority, to monitor the plan indefinitely to make sure that the initial *Swann* requirements are maintained year after year in spite of demographic changes which are in no way attributable to the school board. A unanimous Court in *Swann* made clear that the Constitution requires the dismantling of dual school systems, but does not mandate racial balance in schools. This principle was reaffirmed in *Milliken* v. *Bradley*, 418 U.S. 717, 740-741 (1974).

The district court was clearly correct, therefore, in holding that no new plan of student assignment to increase racial balance could be imposed on the school district in the absence of any showing that the district court's 1970 order creating a unitary system had not been complied with, and the court of appeals erred in reversing the district court's decision.

III. The Court of Appeals Erred in Reversing the Finding of the District Court that the Government had Failed to Comply with the Notice Requirement of the Equal Educational Opportunity Act of 1974

In 1976 the district court denied the government's motion for supplementary relief on the additional ground that the government had failed to comply with the notice requirement of the Equal Educational Opportunity Act of 1974. In Section 202 of the Act, 20 U.S.C. § 1701, Congress declared "it to be the policy of the United States that — (1) all children enrolled in public schools are entitled to equal educational opportunity without regard to race, color, sex, or national origin, and (2) the neighborhood is the appropriate basis for determining public school assignments." And in Section 205, 20 U.S.C. § 1704, Congress provided that a failure to achieve school racial balance "shall not constitute a denial of equal educational opportunity, or equal protection of the laws."

Section 208, 20 U.S.C. § 1707, provides:

> When a court of competent jurisdiction determines that a school system is desegregated, or that it meets the constitutional requirements, or that it is a unitary system, or that it has no vestiges of a dual system, and thereafter residential shifts in population occur which result in school population changes in any school within such a desegregated school system, such school population changes so occurring shall not, per se, constitute a cause for civil action for a new plan of desegregation or for modification of the court approved plan.

Finally, Section 259, 20 U.S.C. § 1758 provides:

> Notwithstanding any other law or provision of law, no court or officer of the United States shall enter, as a remedy for a denial of equal protection of the laws, any order for enforcement of a plan of desegregation or modification of a court-approved plan, until such time as the local educational agency to be affected by such order has been provided notice of the details of the violation and given a reasonable opportunity to develop a voluntary remedial plan. Such time shall permit the local educational agency sufficient opportunity for community participation in the development of a remedial plan.

In 1976 the district court found that "Defendant district has not been provided notice of the details of any violation of equal educational opportunity or of equal protection of law, and further that plaintiff has neither alleged nor proved specific instances or examples of denial of these rights to any person by defendant district. Without such notice defendant has not been permitted sufficient opportunity for community participation in the development of a remedial student integration plan as sought by plaintiff." R. 400-401. the court therefore held:

> Plaintiff has failed to satisfy the requirements of 20 U.S.C.A. 1758 with respect to providing notice to defendant district of the details of any violation of equal educational opportunity or of equal protection of law. Thus, defendant has not been given a reasonable opportunity to develop a voluntary remedial integration plan with time for community participation therin. Accordingly, this Court is prohibited under the provisions of 20 U.S.C.A. 1758 from granting plaintiff's motion for supplementary relief. R. 402.

In 1978 the court of appeals reversed the district court's finding and holding as to the Act, holding (566 F.2d at 1226):

> No judicial ruling had been made concerning the attainment of a 'unitary' system. The case had not been closed. Under the facts of this case, the statute is not controlling; but, if it were, reversal would nevertheless be mandated because the government has complied with its basic requirements.

The court of appeals then noted that the government had, by letter of April 15, 1976, advised the school district that "additional steps were necessary to bring the district into compliance with federal law," had "pointed out . . . that the one-race, or predominantly one-race status of twelve of the district's schools was the primary concern of the government," and had "explained . . . that the particular feeder pattern of elementary to junior high to senior high schools used by the school district was the chief cause for these one-race schools." *Ibid.*

On remand, the district court found that the court of appeals had apparently misunderstood the district court's findings on this issue. The district court stated that it had not found, as the court of appeals apparently believed, merely that "the United States had failed to give the District notice of its dissatisfaction with the resulting effects of the 1970 Order," but had found, and again finds, that "the United States had neither pleaded nor proved that the SPISD violated either the right to equal educational opportunity or the right to equal protection of the laws of District students." App. B16. The district court, therefore, again held that it was "foreclosed by the language and intent of the Act from 'enter[ing] . . . any order for . . . modification of [the] court-approved plan.' 20 U.S.C. §1758." App. B16-17. In its present opinion, the court of appeals again reversed this holding, but solely by readopting its earlier decision on the basis of "the doctrine of the law of the case" and without further consideration or discussion. App. A3. Our discussion of this issue must, therefore, refer to the court of appeals' 1978 opinion.

The court of appeals erred both in holding that the Act is not applicable to this case and in holding that, in any event, the government had complied with the Act. First, the court of appeals was mistaken in finding that "No judicial ruling had been made concerning the attainment of a 'unitary' system." The district court's 1970 order explicitly provided that its purpose was "to establish a unitary school system in the South Park

Independent School District (R. 62) and in 1976 the court found that this order had been fully complied with by petitioner. R. 403. The district court, therefore, could not have ruled in 1976 that a unitary system had not been established as of 1970 except by repudiating its 1970 order. In any event, Section 259 of the Act explicitly provides that the notice requirement applies to any order for the "modification of a court-approved plan" as well as to any order "for enforcement of a plan." There is, therefore, no basis for the court of appeals' conclusion that "the statute is not controlling."

Second, the effect of the court of appeals' interpretation of the notice requirement of the Act is to reduce it to a nullity. Under the Act the government was required to provide petitioner with "notice of the details of the violation" alleged — "a denial of equal educational opportunity or a denial of equal protection of the laws." Contrary to the holding of the court of appeals, the government's letter of April 15, 1976, clearly did not comply with this requirement by (1) informing petitioner of the government's belief that "additional steps need to be taken in order to bring the district into compliance with federal law" and adding (2) "we refer to the continued operation [of twelve named schools] as one-race of predominantly one-race facilities" and (3) "this situation continues to exist at least in part, as the result" of feeder patterns. The first statement does not purport to state any violation; the second states only that some racially imbalanced schools exist, which is not in itself a violation; and the third, referring to feeder patterns, adds nothing to the second in this regard. The racial composition of secondary schools is always due to the racial composition of their feeder schools, and the government did not notify petitioner of any alleged violation in either the feeder patterns or in the composition of the feeder schools.

Whether considered singly or in combination, therefore, the statements in the government's April 15, 1976 letter did not

notify petitioner of any constitutional or statutory violation, much less of the *details* of a violation. The letter did no more than inform petitioner of the fact that some racially imbalanced schools existed, but that fact does not constitute either a denial of equal educational opportunity or a denial of equal protection of the laws. The district court was clearly correct, therefore, in holding that the government had not complied with the Act's requirement that the government notify petitioner of "the details of the violation" alleged, and the court of appeals clearly erred in reversing that holding.

CONCLUSION

For the reasons set forth above, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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PROOF OF SERVICE

I, Tanner T. Hunt, Jr., hereby certify that I have served three (3) copies of the foregoing Petition for Writ of Certiorari on counsel for the parties, as provided in Rule 33, by depositing the same in the United States mail, postage prepaid, to:

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This 15th day of September, 1981

.....

TANNER T. HUNT, JR.
Counsel of Record

APPENDIX A

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

Unit A

No. 80-1870

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

v.

TEXAS EDUCATION AGENCY (SOUTH PARK INDEPENDENT SCHOOL DISTRICT), ET AL.,

Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS

(May 28, 1981)

Before CHARLES CLARK and RANDALL, Circuit Judges, and SHARP*, District Judge.

SHARP, District Judge.

The South Park Independent School District (SPISD) desegregation case is now entering its second decade. This litigation has a protracted history and has already resulted in one judgment and opinion of this court found at 566 F. 2d 1221. Therefore, only the briefest summary of the facts of the case is necessary here. A fuller description may be found in this court's previous opinion.

* District Judge of the Northern District of Indiana, sitting by designation.

The United States has contended since July of 1976 that the 1970 desegregation plan ordered by the district court produced unacceptable levels of integration and that supplemental relief was necessary. The government's position was then, and remains, that the SPISD must adopt and implement a desegregation plan which satisfies the requirements of *Swann* v. *Charlotte-Mecklenberg Board of Education,* 402 U.S. 1 (1971). On September 9, 1976 the district court held the SPISD was a unitary school system from the moment it entered its original desegregation order August 31, 1970. On appeal this court reversed the district court and remanded the cause for further findings of fact. *United States* v. *South Park Independent School Dist.,* 566 F. 2d 1221 (5th Cir.), *cert. den.,* 439 U.S. 1007 (1978). There this court stated:

> In allowing the existence of one race schools in limited situations, the *Swann* opinion emphasized that findings should be made demonstrating that their existence is not the result of present or past discriminatory action. The district court's holding that the SPISD is a "unitary" school system is not detailed enough to show us whether or not the school system meets this *Swann* requirement. For this reason, it is necessary to remand this case to the district court for supplemental findings of fact in order to determine whether or not the SPISD is in fact a "unitary" school system. 566 F. 2d at 1225.

On remand, an evidentiary hearing was held on December 3-6, 1979. The testimony of 49 witnesses was heard; much undisputed statistical evidence was presented. The district court filed its memorandum opinion and order on June 6, 1980 denying the requested relief. The district court again found that its desegregation order of August 31, 1970 created a unitary school system by implementing a racially neutral attendance zone for each school. Therefore, the district court reasoned it was without jurisdiction to consider the request for supplemental relief in the form of additional plans to desegregate. The court explained that this was not a "step at a time" desegregation plan so it was

unnecessary to specifically retain jurisdiction in the 1970 order to determine when a unitary system had finally been obtained. Rather, the district court believed it had devised a plan which immediately eliminated all vestiges of the previous dual school system and created a unitary school. The court also found that there was no evidence to support a finding that either the SPISD or the State of Texas had attempted to fix or alter demographic patterns to affect the racial composition of the schools. Thus, having not retained jurisdiction and lacking evidence that would trigger its jurisdiction the district court found itself foreclosed by lack of jurisdiction from considering the motion for supplemental relief.

The district court also found that there was insufficient evidence to support a finding that racial considerations played any part in the reassignment of principals prior to the 1977-1978 school year. It is unnecessary to address this finding herein as it is subordinate to this court's conclusions on the broader issue of unitariness. The district court also held that the United States had failed to meet its burden of pleading and proof pursuant to 20 U.S.C. § 1758. This court stated in its prior opinion that "under the facts of this case, the statute [20 U.S.C. § 1758] is not controlling; but, if it were, reversal would nevertheless be mandated because the government has complied with its basic requirement." *Supra*, 566 F. 2d at 1266. The doctrine of the law of the case is firmly established, its basis being the sound policy that when an issue is once litigated and decided that should be the end of the matter. *Pickens* v. *Okolona Mun. Separate School Dist.*, 594 F.2d 433 (5th Cir. 1979), citing *United States* v. *United States Smelting, Refining and Mining Co.*, 339 U.S. 186, 198 (1950); *Morrow* v. *Dillard*, 580 F.2d 1284, 1290 (5th Cir. 1978). There has been no new life breathed into this issue by the subsequent evidence and the parties' argument here, so it remains as previously decided.

The scope of review here is controlled by Federal Rule of Civil Procedure 52. It provides that findings of fact "shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." F.R. Civ. Pro. 52(a). Justice Reed wrote in *United States* v. *United States Gypsum Co.*, 333 U.S. 364, 395 (1948) that "a finding is *clearly erroneous* when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Id.*, (emphasis in original). This circuit has long relied on that formulation of the rule. See *Gele* v. *Wilson*, 616 F.2d 146 (5th Cir. 1980); *Amstar Corp.* v. *Dommino's Pizza, Inc.*, 615 F.2d 252 (5th Cir.), *cert. den.*, 101 S. Ct. 268 (1980); *Western Cotton Oil Co.* v. *Hodges*, 218 F.2d 158 (5th Cir. 1954). In *Dayton Board of Education* v. *Brinkman*, 443 U.S. 526, *rehearing den.*, 100 S. Ct. 186 (1979), the Supreme Court addressed the obligation of the Courts of Appeal in school desegregation cases. There the Sixth Circuit Court of Appeals found that the defendants were operating a dual school system and that the finding of the district court to the contrary was clearly erroneous. *Brinkman* v. *Gilligan*, 583 F.2d 243, 253 (6th Cir. 1978). The Supreme Court stated that the rule and duty of the Courts of Appeals are clear: it must determine whether the trial court's findings are clearly erroneous, sustain them if they are not, but set them aside if they are. *Dayton, supra*, at 534, n. 8. The most telling evidence introduced in this case is the attendance figures for the district schools. The appellant's burden, "under Fed. R. Civ. P. 52(a), of showing that the trial judge's findings of fact are clearly erroneous is not as heavy . . . as it would be if the case had turned on the credibility of witnesses appearing before the trial judge . . . However, regardless of the documentary nature of the evidence and the process of drawing inferences from undisputed facts, the reviewing court must apply the clearly erroneous test." *Petition of Geisser*, 554 F.2d 698 (5th Cir. 1977); citing *Sicula Oceanica, S. A.* v.

Wilmar Marine Eng. & Sales Corp., 413 F.2d 1332, 1333-34 (5th Cir. 1969); see also *Jenkins* v. *Louisiana State Bd. of Educ.*, 506 F.2d 992, 995 (5th Cir. 1975); *Burston* v. *Caldwell*, 506 F.2d 24, 26-27 (5th Cir.), *cert. den.*, 421 U.S. 990 (1975); *Galena Oaks Corp.* v. *Scofield*, 218 F.2d 217 (5th Cir. 1954). We should not, however, overturn the decision of the trial court unless we are left with the definite and firm conviction that a mistake has been made. *United States Gypsum Co., supra; Volkswagen of America, Inc.* v. *Jahre*, 472 F.2d. 557 559 (5th Cir. 1973).

Until the late 1950's the SPISD unconstitutionally operated a school system pursuant to Texas law which required black and white students and faculty assigned to separate schools. The Supreme Court first characterized school systems as "dual" or "unitary" according to their racial status in *Green* v. *County School Board of New Kent Co., Va.*, 391 U.S. 430 (1968). The court enunciated six criteria: faculty, staff, student bodies, facilities, extra-curricular activities and transportation; and in order to achieve a unitary status the school district must be fully integrated in all six respects. *Id.*, at 435. In *Columbus Board of Education* v. *Penick*, 433 U.S. 449, *reh. den.*, 100 S. Ct. 186 (1979), the Supreme Court stated that since *Brown* v. *Board of Education (II)*, 349 U.S. 294 (1955), the Columbus School Board has been under a continuous constitutional obligation to disestablish its dual school system. "Brown II was a call for the dismantling of well-entrenched dual systems and school boards operating such systems were clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system." Id., at 458-459; citing *Green, supra*, at 437-438. In *Swann, supra*, the Supreme Court said in regard to student assignments:

> No *per se* rule can adequately embrace all the difficulties of reconciling the competing interests involved; but in a system with a history of segregation the need for remedial criteria

> of sufficient specificity to assure a school authority's compliance with its constitutional duty warrants a presumption against schools that are substantially disproportionate in their racial composition. Where the school authority's proposed plan for conversion from a dual to a unitary system contemplates the continued existence of some schools that are all or predominantly of one race, they have the burden of showing that such school assignments are genuinely nondiscriminatory. *Supra*, at 26.

The board's continuing affirmative duty to disestablish the dual system is therefore beyond question. *Columbus, Supra* at 460; *McDaniel* v. *Barresi*, 402 U.S. 39, 41 (1971); *United States* v. *Greenwood Mun. Separate School Dist.*, 406 F.2d 1086, 1093 (5th Cir.); *cert. den.*, 395 U.S. 907 (1969).

The circuit has recognized that a district court walks a narrow line between deciding whether unitary status has or has not been attained. *Fort Bend Independent School Dist.* v. *City of Stafford*, 594 F.2d 73, 76 (5th Cir. 1979). The judgment adopting the ultimate plan here was adopted in 1970, 15 years after *Brown II*. The district court subsequently held that the SPISD was converted to a unitary school system by the introduction of this desegregation plan on August 31, 1970. This court has addressed a similar suggestion in *Thompson* v. *Madison County Board of Education*, 469 F.2d 582 (5th Cir. 1974), stating:

> We are unable to comprehend the suggestion in the district court's opinion and now urged upon this court by the Board that the school system became a unitary system the moment our decree was to become effective ... If the journey from *Brown* to *Swan* and beyond has taught us anything, it is that integration does not occur merely when and because we say it should. The journey has been necessary because we have been concerned with conduct and action, not words. 496 F.2d at 686-687.

This court has made it abundantly clear in the past that a school system is not automatically desegregated when a constitutionally

acceptable plan is adopted and implemented. *Henry* v. *Charlesdale Separate School Dist.*, 579 F.2d 916, 921 (5th Cir. 1978).

Here the simple numerical evidence of student enrollment reflects the effect, or lack thereof, of the desegregation plan.[1] In the school year 1969-1970 there were approximately 13,059 students in the SPISD; of which 8,653 were white and 4,406 were minorities, 4,245 of which were black. Thus, 34% of the students were minorities, 33% being black. In the school year 1979-1980 there were approximately 11,075 students in the SPISD, of which 6,415 were white and 4,660 were minorities, 4,384 of which were black. Thus, 42% of the students were minorities, 40% being black. Prior to the time this plan was implemented in 1970 there were 15 schools out of 20 which were 90% or more one race. See Appendix A 1969-70 column. After this plan had been in effect nine years there were 11 schools out of 18 which were 90% or more one race. See Appendix A 1979-80 column. Ten of these eleven one race schools in 1979-80 were one race schools in 1969-70 and have remained so throughout. Finally, it must be noted that in 1969-70, 9,294 students attended one race schools or 71% of a student population of 13,059; in 1979-80, 8,390 students attended one race schools, or 76% of a student population of 11,075. See Appendix A columns for 1969-70 and 1979-80.

Against this background the evidence of record demonstrates convincingly that the defendants have failed to eliminate the continuing system wide effects of the prior discriminatory dual school system. The Supreme Court has stated that "the measure of the post-Brown conduct of a school board under an unsatisfied duty to liquidate a dual school system is the effectiveness . . . of the actions in decreasing or increasing the segregation

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[1] Appendix A and the figures used here are drawn from student enrollment data found in Government Exhibit # 1, admitted 8-19-76 and Government Exhibits #s 1, 2 and 10, admitted 12-6-79.

caused by the dual system." *Dayton, supra,* at 538. Consequently, this court is compelled to hold that the district court's finding that the school system is unitary is clearly erroneous because in fact the school system remains a dual one.

This circuit has addressed the necessity for the district courts to retain jurisdiction over such cases in order to insure the proper implementation of the desegregation plan and the achievement of the ultimate goal — a unitary school system. See *Lee* v. *Macon County Bd. of Educ.*, 584 F.2d 78 (5th Cir. 1978). In *Youngblood* v. *Board of Public Instruction of Bay Country*, 448 F.2d 770 (5th Cir. 1970), this court outlined the procedure necessary to the conclusion of a school desegregation case. This court there required first that the district court retain jurisdiction over the action for a period of not less than three years. During those three years the school district was required to file semi-annual reports with the district court similar to those in *United States* v. *Hinds*, 443 F.2d 611, 618-619 (5th Cir. 1970). Second, at the conclusion of those three years the district court should consider whether the cause should be dismissed. Further, the district court could not dismiss the cause without notice to the plaintiffs below and a hearing provided the plaintiffs an opportunity to show cause why the dismissal should be further delayed. Citing *Wright* v. *Bd. of Public Instruction*, 445 F.2d 1397 (5th Cir. 1971). For cases following *Youngblood* see *Lee, supra; United States* v. *Texas et al (San Felipe Del Rio Consolidated Independent School District)*, 509 F.2d 192 (5th Cir. 1975); *Calhoun* v. *Cook*, 451 F.2d 583 (5th Cir. 1971).

In denying the requested relief the district court relied on the rationale of the *Swann* opinion which states:

> Neither school authorities nor district courts are constitutionally required to make year-by-year adjustments of the racial composition of student bodies once the affirmative duty to desegregate has been accomplished and racial discrimination through official action is eliminated from the system. This does not mean that federal courts are without

> power to deal with future problems; but in the absence of a showing that either the school authorities or some other agency of the State has deliberately attempted to fix or alter demographic patterns to affect the racial composition of the schools, further intervention by a district court should not be necessary. 402 U.S. at 32

This court's decision in *Youngblood* does not contradict these principles. Rather, "We were establishing [in Youngblood] a uniform rule upon which school authorities and district courts might rely for insuring proper local and judicial administration of the school desegregation process. It has never been our purpose to keep these cases interminably in court." *United States* v. *Texas et al, supra*, at 194. However, the district courts' well intended attempt to create a unitary school system by the entering of an order has proved unsuccessful.

The district court had jurisdiction over this matter when it entered its order of August 31, 1970 and contrary to its idealistic belief it had jurisdiction in 1976 when supplemental relief was sought for the plan was apparently ineffective then. See Appendix A 1976-1977 column. This court had jurisdiction in 1978 and has jurisdiction now. The district court had jurisdiction to carry out the 1978 mandate of this court and has jurisdiction to carry out the mandate entered here and now. Any doubts as to jurisdiction are thus removed. Therefore, in light of the 1970 plan's failure to disestablish the dual school system, this cause is remanded to the district court to develop and implement with the assistance of the parties a new constitutional desegregation plan. This plan shall be in place and operation for the 1981-1982 school year. Nor shall any further extension of time be permitted. Finally, the district court shall comply with the administrative guidelines laid out by this court in *Youngblood* and its progeny. REVERSED AND REMANDED.

STUDENT ENROLLMENT
SOUTH PARK INDEPENDENT SCHOOL DISTRICT

SCHOOL	1968-1969			1969-1970			1971-1972			1976-1977			1979-1980		
	Black	White	% Black	Black	White	% Black	Black	White	% Black	Black	White	% Black	Black	White	% Black
Forest Park High School	54	1622	3	31	1720	2	34	1698	2	36	2019	2	48	1878	3
Hebert High School	1159	0	100	1156	0	100	1188	1	99	1209	2	99	1152	1	99
South Park High School	99	840	11	131	1102	11	190	913	17	331	502	40	345	373	48
MacArthur Middle School	134	834	14	96	503	16	176	330	35	274	310	47	210	237	47
Marshall Middle School	3	600	5	0	604	0	11	632	2	6	577	1	10	519	2
Memorial Middle School	39	822	5	15	836	2	47	798	6	Unavailable			Unavailable		
Vincent Jr. High										31	696	4	44	682	6
Odom Middle School	850	0	100	868	0	100	734	0	100	814	1	99	758	4	99
Amelia Elementary Sch.	40	1127	3	11	1102	1	59	910	6	37	879	4	41	994	4
Bingham Elementary School	98	421	19	80	359	18	95	340	22	107	249	30	113	190	37
Blanchette Elementary	537	0	100	668	17	97	574	0	100	550	0	100	505	2	99
Caldwell Elementary School	3	334	9	1	326	3	62	402	13	36	352	9	54	291	16
Curtis Elementary Sch.	17	568	3	4	625	6	58	496	11	39	641	6	31	598	5
Fehl Elementary Sch.	106	278	28	130	235	36	410	20	95	326	21	94	364	24	94
Giles Elementary Sch.	207	140	60	212	71	75	147	127	54	20	19	51			
Hollywood Elementary	132	0	100	85	0	100		Closed			Closed			Closed	
Pietzsch Elementary	69	576	11	48	592	8	124	352	26	151	324	32	191	222	46
Regina Howell Elementary	2	395	5	0	352	0	38	412	8	37	279	12	29	307	9
Southerland Elementary	166	0	100	191	0	100	131	32	80	Unavailable			9	4	69
Tyrell Park Elementary	26	230	10	17	209	8	34	196	15	61	139	31	82	88	48
West Oakland Elementary	511	0	100	501	0	100	418	0	100	Unavailable			Unavailable		
Price Elementary School										382	0	100	398	1	99

APPENDIX B

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

UNITED STATES OF AMERICA

v.

SOUTH PARK INDEPENDENT SCHOOL DISTRICT, ET AL.

CIVIL ACTION NO. 6819

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MEMORANDUM OPINION ON REMAND[1]

Pursuant to the mandate of the United States Court of Appeals for the Fifth Circuit, this Court held an additional hearing for the purpose of "determining whether or not the [South Park Independent School District ("SPISD" or "District")] is in fact a 'unitary' school system" and whether the reassignment of principals by the District prior to the 1977-1978 school year "was done without regard to the race of the individuals involved."[2] United States v. South Park Ind. School Dist., 566 F.2d 1221, 1225-26 (5th Cir.), *cert. denied*, 439 U.S. 1007 (1978).

Because this Court finds that its school desegregation order of 31 August 1970 ("1970 Order" or "desegregation Order") created a unitary system for the SPISD by implementing a racially neutral attendance zone for each school, it concludes that it is without jurisdiction to consider the United States' motion for "supplemental relief" seeking an order requiring the SPISD to come forward with additional plans to desegregate the students within the District. Pasadena City Bd. of Educ. v. Spangler, 427 U.S. 424, 434-37 (1976); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 31-32 (1971). The Court also finds that there is insufficient evidence to support a finding that racial considerations played any part in the reassignment of principals by the District prior to the 1977-1978 school year. Thus, it is the conclusion of the Court that the SPISD violated neither the 1970 Order nor the Constitution of the United States in the principal reassignments. *See* Singleton v. Jackson Mun.

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[1] This memorandum opinion constitutes the additional findings of fact with conclusions of law as required by the remand order of the United States Court of Appeals for the Fifth Circuit. *See* United States v. South Park Ind. School Dist., 566 F.2d 1221, 1225-26 (5th Cir. 1978).

[2] The hearing took 4 days. The testimony of 49 witnesses was heard; much undisputed statistical evidence was presented.

Sep. School Dist., 419 F.2d 1211, 1217-18 (5th Cir. 1969), *cert. denied*, 396 U.S. 1032 (1970).

I

A

On 31 August 1970, this Court entered an order ("1970 Order" or "desegregation Order") implementing a school desegregation plan for the SPISD. The language, intent, and effect of the 1970 Order was to "establish a unitary school system in [the] . . . District." The desegregation Order provided, with one exception, for the desegregation of the student body in the District schools by a neighborhood school plan. Under the plan, attendance zones were drawn encompassing each of the three high schools, four junior high schools (now middle schools), and eleven elementary schools. As an exception to the neighborhood school concept, a majority-to-minority transfer option was included. Under this scheme, a student who is assigned to a school in which a majority of the students are of his race may elect to attend any other school in the SPISD in which members of his race are a minority. Students who elect this option are given transportation by the District to the school of their choice.[3] Further, these students are given priority for space in any school which they elect to attend — not merely the closest SPISD school in which their race is in the minority.[4]

The 1970 Order also provided for the desegregation of faculty and staff within the schools in the District. Under the desegregation Order, the ratio of Black teachers and staff to White teachers and staff in each school is within five percent (5%) of the

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[3] Although the SPISD is only required to furnish transportation if it is available from District-controlled sources, the District furnishes bus transportation to all students electing the majority-to-minority transfer option.

[4] No other specific exemptions to the attendance zones were permitted under the 1970 Order, other than for certified special education students and high school seniors in the 1971 classes at the three District high schools.

ratio of Black teachers and staff to White teachers and staff in the District.

After entry of the 1970 Order none of the parties appealed. It became final.

B

On 19 July 1976, nearly 6 years after entry of the desegregation Order, the United States moved for supplemental relief requesting that this Court order the SPISD to develop, adopt, and implement a comprehensive school desegregation plan which would satisfy the requirements of subsequent pronouncements of the Supreme Court of the United States and the United States courts of appeals in school desegregation cases.[5] No allegation was made that the SPISD had failed to comply with the 1970 Order.

On 11 August 1976, approximately 1500 parents and students ("Parents and Students") living within the District moved to intervene as a class representing themselves and others similarly situated.

A hearing was held on 16 and 19 August 1976. It was the position of the SPISD that it had remained in full compliance

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[5] The motion of the United States was preceded by a letter of 15 April 1976 from the Department of Justice to counsel for the District. The letter, the first indication that the United States was dissatisfied with the District's assignment of pupils to schools since the entry of the desegregation Order on 31 August 1970, advised that "additional steps need[ed] to be taken in order to bring the district into compliance with Federal law." That the United States would take such a position was somewhat surprising to the District as in each year since 1970 the United States Department of Health, Education, and Welfare (now Department of Education) had approved the student assignment plan being used by the SPISD administrative staff conducted an intensive study to determine whether an alternative plan might be devised which would produce greater student desegregation at certain schools. Following the study, the District concluded that the plan promulgated by the 1970 Order was the most educationally sound plan available under the circumstances.

with the terms of the 1970 Order, that agencies of the United States had consistently approved the District's implementation of the 1970 Order, that the differences in the racial composition of schools from those anticipated in 1970 when the desegregation Order was entered were the result of changed residential patterns beyond the District's control, that since 1970 the SPISD had been guilty of no segregative acts, and that the 1970 Order was the most educationally sound and constitutionally acceptable integregation plan available to the District. The United States presented oral argument in support of its motion and in opposition to the motion to intervene of the Parents and Students. Several witnesses were called by the SPISD to substantiate its position. No testimony was offered by the United States.

On 9 September 1976, an order was entered denying the motion for supplemental relief of the United States and granting the motion to intervene of the Parents and Students. This Court found that while some of the SPISD schools reflected a lesser percentage of desegregation than had been anticipated, other schools reflected a greater degree of desegregation than had been expected in 1970, and that evidence established that the desegregative results at schools differing from those anticipated in 1970 were the consequence of changed residential patterns beyond the control of the District. Moreover, it was apparent that the District had taken no affirmative action with segregative intent since 1970, nor refrained from taking any action within the scope of the 1970 Order which, if taken, would have increased the segregative results at those schools where the degree of desegregation was less than anticipated. This Court also found that the neighborhood school plan, as set out in the desegregation Order, dissolved all vestiges of a dual system. Thus, having specifically found a unitary system established by its 1970 Order, this Court concluded that it had no jurisdiction to consider the motion of the United States for supplemental relief.

The United States appealed.

C

In March of 1977, the SPISD announced that all principals would be reassigned to different schools for the 1977-1978 school year. These new assignments did not alter the level of desegregation of faculty and staff in any school inasmuch as the unintended result of the reassignments was to place White principals in positions formerly held by White principals, and Black principals in positions formerly occupied by Black principals.

On 8 August 1977, the United States filed an application for an order to show cause why the SPISD should not be required to comply with the 1970 Order insofar as it relates to the assignment of faculty and staff of the District. It was the contention of the United States that the SPISD had violated the 1970 Order by reassigning Black principals to schools which had a majority of Black students and White principals to schools in which White students were in the majority.

After hearing the application of the United States, this Court found that the racial composition of none of the SPISD schools was indicated by the principal reassignments, that the reassignments did not produce a decrease of faculty and staff integration in the District,[6] and that the SPISD had fully complied with the

[6] The SPISD announced the reassignment of assistant principals for the 1977-1978 school year along with the principal reassignments. The two high schools with majority White student populations, Forest Park High School and South Park High School, would continue to have Black assistant principals. As in the past, the predominantly Black high school, Hebert High School, would have a White assistant principal. For the first time, a middle school populated by a majority of White pupils, MacArthur Middle School, would have a Black assistant principal. Thus, the effect of the reassignment of assistant principals for 1977-1978 was to maintain the prior level of desegregation among school building faculty and staff except at MacArthur Middle School where staff desegregation was increased by the addition of a Black assistant principal.

1970 Order in the principal reassignments. Accordingly, the application was denied.

The United States appealed.

D

On appeal to the United States Court of Appeals for the Fifth Circuit, the order denying the motion of the United States for supplemental relief (student desegregation) was joined with the order denying the United States' application for an order to show cause (principal reassignments). The court of appeals reversed and remanded for additional findings to support this Court's rulings. United States v. South Park Ind. School Dist., 566 F.2d 1221, 1225-26 (5th Cir. 1978). A rehearing *en banc* was denied. United States v. South Park Ind. School Dist., 569 F.2d 1155 (5th Cir. 1978) (table).

The Supreme Court of the United States denied certiorari. Board of Educ. v. United States, 439 U.S. 1007 (1978). Two Justices dissented. *Id.* A rehearing was denied. *Id.* at 1135.

II

In focusing attention on the issue of school desegregation by eliminating the racial identifiability of the SPISD schools, it is important to clarify exactly what this Court did *not* do in its 1970 Order. First, unlike the practice required when a court implements a "step at a time" plan, it was unnecessary for this Court in the 1970 Order to "specifically retain[] jurisdiction of [the] cause." *See, e.g.*, Carr v. Montgomery County Bd. of Educ., 289 F. Supp. 647, 654 (M.D. Ala.), *modified*, 400 F.2d 1 (5th Cir. 1968), *rev'd*, 395 U.S. 225 (1969) (order of district judge reinstated as entered). Nor did this Court in 1970 choose to implement a desegregation plan which would require periodic reexamination and reappraisal to determine when a unitary system finally had been obtained. Instead, from the desegregation plans submitted by the United States and the District, this Court devised a plan which, by immediately eliminating the vestiges of

a dual system, achieved for the SPISD a unitary school system and the first paragraph of the 1970 Order implementing the plan so states:

ORDER FOR IMPLEMENTATION
OF SCHOOL INTEGRATION PLAN

The court having heard testimony in open hearing and having considered the arguments of counsel for the United States of America and for Defendant South Park Independent School District with respect to *the immediate implementation of a school integration plan designed to establish a unitary school system* in South Park Independent School District.

It is ordered that the Board of Trustees of South Park Independent School District proceed to implement, not later than September 2, 1970, the following desegregation plan:

(emphasis added).

A

By entry of the 1970 Order, this Court concluded that the establishment of a neighborhood school attendance plan, together with the introduction of a majority-to-minority transfer option and faculty and staff desegregation, established a unitary system. The 1970 Order was based on then current demographic information presented during the 1970 hearings and accepted by both the United States and the District. This information indicated that only two of the District's then eighteen schools were likely to retain student racially identifiability. These two schools, Blanchette Elementary School and West Oakland Elementary School (now Price Elementary School), were small elementary schools with limited attendance zones. Blanchette Elementary School served kindergarten through fourth grade students; West Oakland served students in grades one through six. The remaining schools, the three high schools, four junior high schools (now known as middle schools), and the other nine elementary

schools, would lose all vestiges of student racial identifiability under the attendance plan set out in the 1970 Order.

The importance of this finding, that the Court established a unitary system with the entry of the 1970 Order, cannot be understated. For once a court finds that a school district has achieved a unitary status, absent a further segregative act, it loses jurisdiction over the matter. *See* Pasadena City Bd. of Educ. v. Spangler, 427 U.S. 424, 434-37 (1976).

This concept is best illustrated by the recent decision of the United States Court of Appeals for the Fifth Circuit in *Lee v. Macon County Board of Education.* Lee v. Macon County Bd. of Educ., 584 F.2d 78 (5th Cir. 1978). In a proceeding in 1977 to reopen a school, a United States district court entered an order which found that the Baldwin County, Alabama school system, which had been operating under a 1970 court-ordered desegregation plan, was "desegregated and . . . unitary in nature." *Id.* at 81. No objections to the order were filed.

Subsequently, the United States and other parties intervened to prevent the school from reopening. When the intervenors were denied the relief that they sought, some of them appealed.

The Fifth Circuit first considered whether the district court had subject matter jurisdiction over the proceedings.

> Federal district courts possess jurisdiction over school desegregation cases only because of unconstitutional action by the state or by the local school board. The magnitude of the constitutional violation, the scope of the remedy required to redress the violation, and the possibility of recurring violations have all made it necessary for the district courts to retain jurisdiction over many such cases in order to insure the proper implementation of the desegregation plan and the achievement of the ultimate goal — a unitary school system in which the State does not discriminate between public school children on the basis of their race.

Id. Having established these ground rules, the court continued:

> But once that goal has been attained, the district courts may then follow the orderly procedures previously outlined by this Court and enter an order that the school system is indeed unitary.

Id. Then, applying the *Swann* decision of the United States Supreme Court, the Fifth Circuit stated:

> Normally, a court could then close the docket on the case, and "in the absence of a showing that either the school authorities or some other agency of the State has deliberately attempted to fix or alter demographic patterns to affect the racial composition of the schools, further intervention by a district court should not be necessary."

Id. (quoting Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 32 (1971)).

B

Nevertheless, because some of the SPISD schools have reflected a lesser degree of desegregation than was anticipated under the 1970 Order, it is necessary to inquire whether either the SPISD or the State of Texas "has deliberately attempted to fix or alter demographic patterns to affect the racial composition of the [District] schools."[7] *See* Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 32 (1971). If so, the jurisdiction of this Court is again triggered to remedy the violation. *Id.* The Court is, however, unable to find any evidence presented at either the 1976 hearing or the 1979 hearing which would indicate that a deliberate action of the SPISD or of the State of Texas has affected the racial composition of any school and thus concludes that it is without jurisdiction.

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[7] Although it was the position of the District during both the 1976 hearing and the 1979 hearing that whether the SPISD had deliberately attempted to fix or alter demographic patterns to affect the racial composition of the District schools was not in issue as the United States' motion for supplemental relief had suggested no such violation, the Court was of the opinion that the United States should have an opportunity to develop this issue.

To be sure, the racial composition at several of the District schools is significantly different from that projected in 1970 when the desegregation order was entered. Yet, it cannot be disputed that the cause of this disparity is due to a change in residential patterns subsequent to the implementation of the 1970 Order. Clearly, that certain schools are currently attended by students of predominantly one race is not the result of present or past discriminatory action by the District or by Texas. Rather, the evidence establishes that this situation has come about since 1970 as the result of four factors: (1) a mass exodus of White residents from the Hebert High School, the Odom Middle School, the Fehl Elementary School, and the Tyrrell Park Elementary School attendance zones; (2) a significant and continuing decline in student enrollment coupled with an increase of almost ten percent (10%) in the proportion of Black students in the District; (3) the decision of some students to attend private schools; and (4), based on an abundance of evidence presented during the 1979 hearing, the efforts of some White parents residing in the Tyrrell Park area to avoid sending their children to Hebert High School and Odom Middle School by creating guardianships and other legal means.[8]

The migration of White students from the Hebert High School, the Odom Middle School, the Fehl Elementary School, and the Tyrrell Park Elementary School attendance zones was best reflected by the undisputed testimony of Professor Charles Hawkins of Lamar University. Professor Hawkins, an expert witness in economics and demographic statistics, testified that in the 9 years since the 1970 Order was entered by this Court

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[8] Although this phenomenon was generally limited to White parents, there was evidence presented in 1979 to indicate that some Black parents have employed these same devices to circumvent the efforts of the District to enforce the 1970 Order so that their children might attend the predominantly Black Odom Middle School and Hebert High School rather than the school in their neighborhood attendance zone.

several residential areas within the District experienced significant changes in racial composition. Professor Hawkins testified that the Fehl Elementary School attendance zone and a part of the Tyrrell Park Elementary School zone, both densely populated neighborhoods comprised primarily of single-family dwellings, had changed from predominantly White to predominately Black. Both of these neighborhoods are also within the Hebert High School and Odom Middle School attendance zone and were projected in 1970 as the White residential areas which would desegregate those particular schools. It was also Professor Hawkins' expert opinion that the construction of three major housing complexes, which are occupied predominately by Black families, has added to the racial imbalance at Hebert High School, Odom Middle School, an Fehl Elementary School. Corresponding to the changes in the Hebert High School, the Odom Middle School, the Fehl Elementary School, and the Tyrrell Part Elementary School attendance zones, Professor Hawkins believed that most of the other attendance zones within the District continued with the same racial composition as in 1970.

Professor Hawkins also presented information from the Texas Education Agency which indicated to him that since the implementation of the desegregation Order the SPISD has undergone a steady decline in overall enrollment and a steady increase in the proportion of Blacks in the student body. He testified that during this same period other area school districts with predominately White enrollments, such as Lumberton School District and the Vidor School District, experienced dramatic increases in White student enrollments. For example, the enrollment at the lumberton School District, located five miles north of the SPISD, has doubled.

The evidence presented at both the 1976 and the 1979 hearings clearly established that no action or inaction by the District since the entry of the desegregation Order had, as a natural and foreseeable consequence, a segregative effect on the student body

within any school or the District. The SPISD has since 1970 neither opened new schools nor closed existing ones which would affect the racial composition at any District school. Indeed, there was evidence presented during the 1979 hearing which established that the District had taken several steps to increase the overall level of student desegregation. The present superintendent of schools testified that the District has, for several years, rotated its secondary school summer program among the three high schools in order to increase student desegregation. He also testified that the District promotes the majority-to-minority transfer option in local daily newspapers and in the schools.

Additional action taken by the District for the purpose of increasing the level of student desegregation includes scheduling different vocational, language, and other courses in the three high schools. Students electing to attend these courses leave the high school within their attendance zone for a part of each day in order to take one or more courses offered at another District high school. For example, Black students from the Hebert High School attendance zone may take courses at Forest Park High School, a majority White school, or at South Park High School. White students from those schools may take courses at predominantly Black Hebert High School. The attendance of these students, however, is reflected only in the records of the high school within their attendance zone.

In sum, because there is no evidence to support a finding that either the SPISD or the State of Texas has attempted to alter the demographic patterns to affect the racial composition of the District schools, and, in fact, evidence to support a finding that the SPISD acted within the strictures of the 1970 Order to increase the level of student desegregation, the Court must conclude that there is no jurisdiction to alter a previously established unitary system.

C

Although the issue of compliance by the SPISD with the desegregation Order was never technically at issue during either the 1976 or the 1979 hearing,[9] since much testimony was admitted during the 1979 hearing which established that some parents and students had falsified addresses and used other means to attend either an SPISD school other than the one in their attendance zone or a public school outside of the District, the Court believes that it is necessary to determine whether the evidence can support a finding that the conduct of the SPISD in enforcing the school attendance zones violated the terms of the 1970 Order.[10] Immediately prior to the 1979 hearing, an investigation by the United States Department of Justice discovered

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[9] The motion for supplemental relief filed in 1976 did not allege noncompliance by the District with the 1970 Order. Indeed, when the Court inquired of counsel for the United States during the hearings in 1976 whether noncompliance was at issue, counsel for the United States indicated that it was not.

THE COURT: All right, I would inquire of counsel for the Government whether or not you are making the contention that the School District in some way has failed to comply with this Court's order of August 31, 1970.

MR. JENNINGS: No, sir, we are not contending that they have failed to comply . . . .

THE COURT: Now the Court would inquire — the Court doesn't wish to embarrass counsel, because maybe you had nothing to do with it at the time, but if you feel that way now, at the time you filed the motion, do you know why the Government did not feel this way in 1970, in taking an appeal from this Court's order of August 31, 1970?

MR. JENNINGS: I can't answer that.

THE COURT: You have no answer to that?

MR. JENNINGS: No, sir.

Transcript, United States v. South Park Ind. School Dist., (E.D. Tex. Aug. 16, 1976). Nevertheless, when counsel for the United States raised the issue of the District's compliance with the 1970 Order in his opening statement in the 1979 hearing, the Court, in fairness, allowed the United States to present evidence during the hearing in an attempt to develop this issue.

[10] The only evidence that could suggest noncompliance by the SPISD with the 1970 Order was that some students were attending a school

twenty-nine White students living within the predominantly Black Hebert High School and Odom Middle School attendance zone who were attending a school outside of the zone. When the parents of these children were called, their testimony was consistent. First, once the District was apprised that any of these parents had children attending a SPISD school other than Hebert High School or Odom Middle School, the children were immediately enrolled in the correct SPISD school. Second, false addresses had been employed in most cases in an attempt to circumvent the 1970 Order and the efforts of the District to enforce it. And, it was evident that the parents who sought to avoid the effect of the desegregation Order were very much aware of the District's enforcement efforts. Thus, they felt it necessary to employ various devious tactics.

When the testimony of these parents is examined in the light of the District's active policing efforts, it is impossible for this Court to find a violation of the 1970 Order by the SPISD. Several persons testified that both District school administrators and the SPISD trustees understood that they were responsible for implementing without deviation the attendance zones in the 1970 Order. The District's director of attendance assisted principals in the enforcement of the attendance zones. Each of the SPISD principals was given a map depicting the attendance zone for his school and instructions for the enforcement of the school attendance zone. Each principal checked student enrollment cards against the maps and expelled any student found to

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other than the District school for their attendance zone. No evidence was introduced which would tend to prove that the District had altered either the feeder patterns from the elementary schools through the middle schools to the high schools or the attendance zones set out in the desegregation Order. Nor was it suggested that since the entry of the 1970 Order the SPISD deviated from the mandated level of faculty and staff desegregation.

be attending school out of zone. On numerous occasions the District's director of attendance went to student's homes to verify questionable addresses.[11]

D

One additional point needs to be made. Following the 1976 hearing, this Court found that the United States' motion for supplemental relief had failed to provide notice to the SPISD of the details of any violation of equal educational opportunity or equal protection of the laws as required by section 259 of the Equal Educational Opportunities Act of 1974 ("Act"). 20 U.S.C. § 1758. In its opinion, the court of appeals apparently misinterpreted this finding to mean that the United States had failed to give the District notice of its dissatisfaction with the resulting effects of the 1970 Order. *See* United States v. South Park Ind. School Dist., 566 F.2d 1221, 1226 (5th Cir.), *cert. denied*, 439 U.S. 1007 (1978). What the Court intended to find, and does now find, was that the United States had neither pleaded nor proved that the SPISD violated either the right to equal educational opportunity or the right to equal protection of the laws of District students. Because the Court finds as it does, it is foreclosed by the language and intent of the Act from "enter[ing] ... any order for ... modification of [the] court-approved plan." 20 U.S.C. § 1758.

III

Having concluded that it does not have jurisdiction to consider the motion for supplemental relief, the Court turns to the contention of the United States that the SPISD unconstitutionally reassigned its principals immediately prior to the beginning of the 1977-1978 school year.

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[11] In a September 1979 inspection focusing on student assignment, the Technical Assistance Division of the Texas Educational Agency found the SPISD to be in compliance in its enforcement of the 1970 Order.

A

The Court first concludes that the reassignment of principals by the SPISD has fully complied with that much of the 1970 Order which mandates that the ratio of Black teachers and staff to White teachers and staff in each school equal, within five percent (5%), the ratio of Black teachers and staff to White teachers and staff within the District.

It was not the intention of the Court in the 1970 Order to require that a school have as its principal a person of a particular race. Rather, the 1970 Order clearly and explicitly required that the overall racial composition of each District school was determinative of its racial identifiability. It was this Court's understanding then, *see* Singleton v. Jackson Mun. Sep. School Dist., 419 F.2d 1211 (5th Cir. 1969), *cert. denied*, 396 U.S. 1032 (1970), and it is now, *see* United States v. South Park Ind. School Dist., 566 F.2d 1221, 1226 (5th Cir.), *cert. denied*, 439 U.S. 1007 (1978), that the overall racial composition of the faculty and staff of a school, rather than particular positions, was to be considered in deciding whether the school was racially identifiable. It was with this in mind that the faculty and staff portion of the 1970 Order was adopted. Thus, as it is not disputed that since the entry of the 1970 Order the ratio of Black teachers and staff to White teachers and staff in each District school has ever varied by more than five percent (5%) from the District-wide ratio, the Court must conclude that the terms of the 1970 Order have been fully complied with.[12]

B

Moreover, because this Court recognizes, as did the court of appeals, *see* United States v. South Park Ind. School Dist., 566

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[12] In each year since the implementation of the desegregation Order in 1970, the United States Department of Education (formerly Department of Health, Education, and Welfare), has determined that the SPISD was in compliance with that much of the 1970 Order relating to faculty and staff desegregation.

F.2d 1221, 1226 (5th Cir.), *cert. denied*, 439 U.S. 1007 (1978), that the assignment of principals alone may indicate the racial identifiability of a particular school or schools, this Court must also examine whether the reassignment of principals prior to the 1977-1978 school year was based upon racial considerations. The Court concludes that race was not a factor in the reassignment of principals for the 1977-1978 school year.

Testimony elicited during the hearing in 1979 established that the principal reassignments were not made on the basis of race, but rather to provide a new school superintendent with more meaningful faculty and staff evaluation from principals, to give principals who had been assigned to the same school for a number of years a new challenge, and to bring a fresh approach into various schools.

A number of factors, including experience, education, and other qualifications, were considered by the superintendent and his staff prior to making the assignments; race was not considered.

All administrators who were involved in the principal reassignments testified that neither the race of a particular principal nor the racial composition of a particular school was considered or discussed in making the reassignments. A member of the SPISD board of trustees testified that neither the race of a particular principal nor the racial composition of the student body at a particular school was considered or discussed when the board was presented with the proposed reassignments by the superintendent. She further testified that it was the policy of the District that race would not be a factor in the hiring, promotion, salary, or assignment of any employee. Indeed, all five of the Black principals who were reassigned for the 1977-1978 school year testified that they did not believe that race had been a factor in their reassignments.[13]

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[13] That each school would be assigned a principal of the same race as

When these reassignments are examined against a background of complete faculty and staff desegregation within each school, and within the SPISD as a whole, it is even more difficult to find evidence of race entering into the decision to assign a principal to a school. Since the implementation of the 1970 Order, all principals, assistant principals, teachers, teacher aides, coaches, and other staff who work directly with students consistently have been assigned so that the racial composition of a school staff does not suggest that a school was intended for Black or White students. There are Black assistant principals assigned to every SPISD high school and middle school in which the majority of the members of the student body is White; conversely, there are White assistant principals assigned to every SPISD high school and middle school in which the majority of the members of the student body is Black. As part of the summer school, which rotates among the three high schools, a Black principal has served when the program was held at Forest Park High School, a school with an attendance zone of mostly White students, and a White principal has overseen the program when it was conducted at Hebert High School, a school with an attendance zone of mostly Black students. Currently a Black principal is assigned to Regina Howell Elementary School, a predominantly White school, and a White principal is assigned to Price Elementary School, a predominantly Black school.

In sum, when the proof produced at the hearing is considered as a whole, there is insufficient evidence to indicate that race was a factor considered by the SPISD in reassigning the District principals prior to the 1977-1978 school year.

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that constituting the majority of the student body may be explained in part by the choice of school for reassignment made by each principal. None of the principals involved had requested assignment to a school in which their race was in the minority, and, in fact, most principals requested to remain at their original school where, prior to the reassignments, their race was the same as the majority of the student body.

IV

To repeat, the Court concludes that having established a unitary school system for the SPISD in 1970, it is without jurisdiction to consider alternate desegregation plans. Further, there is insufficient evidence to suggest that the reassignment of principals prior to the 1977-1978 school year was based upon racial considerations.

The Court recognizes that the decision reached today may seem incongruous to those within the community who are acutely aware of the several predominantly one-race schools within the District. It is, however, not so. Once a unitary school system has been established, our Constitution neither requires the maintenance of an ongoing racial balance in the public schools, Milliken v. Bradley, 418 U.S. 717, 740-41 (1974), nor, without more, requires the dismantling of a school which is predominantly White or predominantly Black, Dayton Bd. of Educ. v. Brinkman, 433 U.S. 406, 417 (1977). Rather, Our Supreme Law mandates that no system be structured to segregate the races. This rule was succinctly stated by the Chief Justice shortly after this Court had entered its 1970 Order:

> Our objective . . . is to see that school authorities exclude no pupil of a racial minority from any school, directly or indirectly, on account of race; it does not and cannot embrace all the problems of racial prejudice, even when those problems contribute to disproportionate racial concentrations in some schools.

Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 23 (1974). Accordingly, the Constitution neither demands that a court periodically review a desegregation decree to conform to shifting residential patterns within a school district, nor, absent further segregative action by the district, places an obligation upon the court to remedy resegregation after an approved plan is implemented. Pasadena City Bd. of Educ., v. Spangler, 427 U.S. 424, 434-37 (1976).

The findings made by this Court in 1976 are reaffirmed. The motion for supplemental relief of the United States is denied. The application for an order to show cause of the United States is denied. *It is so ordered.*

SIGNED and ENTERED this the 1st day of June 1980.

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JOE J. FISHER
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

UNITED STATES OF AMERICA

V.

TEXAS EDUCATION AGENCY
(SOUTH PARK INDEPENDENT
SCHOOL DISTRICT), ET AL

CIVIL ACTION No. B-6819-CA

MEMORANDUM OPINION AND ORDER

This suit seeking to desegregate the public schools of South Park Independent School District was filed on August 7, 1970. It has traveled a circuitous route that has left in its wake two written opinions of the Fifth Circuit, 566 F.2d 1221 (1978) and .... F.2d .... (May 28, 1981) (No. 80-1870), and two opinions of the United States Supreme Court, 439 U.S. 1007, ... S.Ct. ...., 58 L.Ed.2d 68 (1978) (denial of certiorari with dissenting opinion) and .... U.S. ...., ... S.Ct. .... (July .., 1981) (opinion denying stay.) Indeed, as this order is being written this case remains on petition for certiorari to the Supreme Court. But for the fact that, at least, Mr. Justice Powell considers denial of certiorari a foregone conclusion, a stay would have been granted and the assignment handed this Court would have been either delayed or have become unnecessary. To repeat more than this of what has preceeded this writing would be to simply rehash old litigation history that has become all too familiar to the three levels of Courts involved, the parties, and the community. Time is better spent and attention better focused to the task at hand.

THE MANDATE

The Fifth Circuit Court of Appeals in its May 28, 1981, order charged this Court with the duty to develop *and* implement a constitutional desegregation plan to be in place and in operation for the 1981-82 school year. Along with other directives and guidelines, the Circuit Court further ordered that no additional delays or extensions of time would be permitted. The reasons given in support of the issuance of the mandate are narrow in scope and quite simple — the Court appears to have relied exclusively on statistics. The Court cites the numerical racial makeup of students in 1970 compared to 1980, the number of one-race schools, and the percentage of students attending one-race schools for the same time frame. The Circuit Court apparently presumes that the past state-wide dejure dual system was a direct cause of the present unbalanced racial configuration. These comments are not made in criticism of the mandate, but in explanation of this Court's understanding of its scope. It requires a satisfactory system-wide racial mix — nothing less.

The Judge who had presided over this case since its inception found it necessary to recuse himself and transferred the case to the undersigned. Mr. Justice Powell denied the stay on July 21; this Court had begun new proceedings on July 16.

THE EVIDENCE

The evidence presented at the hearing on July 16, 1981, contained the necessary descriptive data of the makeup of the school district. The government presented, in the alternative, two plans for desegregating the schools. The hearing was then recessed for one week to give the Court an opportunity to examine the documentary evidence, to conduct an inspection of each of the schools in the district, and to permit the school district to prepare its proposals. The hearing was resumed on July 22, 1981, and the Court received in evidence plans from the school board, from Freedom of Choice, a predominately white organization previously permitted to join the case as intervenor,

and from Citizen Action Committee, a black organization which the Court permitted to intervene on July 16. The government subsequently presented yet another alternative for the Court's consideration. The evidence will not be repeated here, except as is necessary for background or explanation of the Court's order. Evidentiary findings and legal conclusions will be filed separately.

The South Park Independent School District is an "L" shaped district that, basically, encompasses the southern and western portions of the City of Beaumont, Texas. The southeastern quadrant is racially mixed and contains Bingman and Pietzsch Elementary Schools, MacArthur Middle School, and South Park High School. Many of the homes in the area reflect the grandeur of an earlier time, and South Park High School is a large, traditional, older school building, having been constructed in 1923. There is associated with the school the expected traditions, and, typical of schools of its era, it has at this time a serious parking problem. In some measure the neighborhood is in transition and is feeling the expanding influence of Lamar University. There is little new residential construction in this area of town.

The southern quadrant of the district is almost totally black and contains Blanchette, Fehl, and Price Elementary Schools, Odom Middle School, and Hebert High School. The area comprises upper-middle and middle class sections, as well as areas on the lower end of the economic spectrum. There are several low-rent housing projects and neighborhoods that contain a concentration of Blacks that fall in the category of being economically deprived. The more affluent areas are composed of Blacks employed in the professions and in the technical and service fields, and also contain a significant number of union-member workers of the local petrochemical industry.

Hebert High School, constructed in 1953, is a source of intense pride for the local black community. The school has

produced many graduates who have distinguished themselves and has been a dominant state-wide force in athletics. Prior to the 1970 desegregation order, the school produced a number of National Merit Scholars; since the entering of that order, there have been none. It would require eight to ten million dollars to bring the physical plant and its contents to a par with Forest Park High School. Included in this cost estimate is the anticipated expansion of its capacity to 1,800 students.

The west end is white and contains Amelia, Caldwood, Curtis, and Regina-Howell Elementary Schools, Marshall and Vincent Middle Schools, and Forest Park High School. The west end is the most affluent of the three sections. The growth patterns of the city are to the west, and most of the new residential construction over the past twenty years has been in this area. While upper and middle-class homes predominate, the area does contain a significant number of middle to lower-middle class citizens. Forest Park High School, constructed in 1968, is more modern than, though similar in construction to, Hebert, and is clearly the superior facility of the three high schools.

The segregated residential pattern in the portion of Beaumont that falls within the South Park Independent School District was not caused solely by the policies and practices of the school district. Clearly, the building plans of the district in the past that accommodated concentrations of residences have had some impact. However, this reason cannot be singled out for any more significance than the myriad other factors, both social and economic, that have also contributed.

The South Park Independent School District has operated since 1970 with a freedom-of-choice plan, with transportation provided to students who transfer from a school in which their race is in the majority to one in which their race is in the minority. The Judge previously assigned to this case has permitted the school board wide latitude in the formulation of policy and has demonstrated great patience in the progress, or lack

thereof, demonstrated by the school board in achieving a workable plan. Judicial restraint, deference to local authority, and encouragement to the parties to reach agreement have guided the Court's action to date. Yet, during this period of time, the school administration has provided no enhancement programs, active communication campaigns with parents, or any other incentives to insure success of its majority-to-minority transfer option. During the 1980-81 school year only 142 students, or less than one and one-half percent of the student population, elected to transfer under the rule, and many of those who did were children of teachers, who tra[illegible]rred to a school in the part of the district in which their pa[illegible]s were assigned to teach.

The school district has definitely experienced white flight. From 1966 to 1981, the percentage of white students has decreased from 67.9% to 57.8%. (Intervenor 1, Exhibit 1). The total student population has decreased from 13,386 to 10,713, while the black population has increased. (Intervenor 1, Exhibit 1). Clearly, the students leaving the school system are white. There has been a greater number of departures in each year that a Court order affecting the school district has been handed down. The lines have been long at the local private schools in anticipation of this order, and most are reported to be at capacity this fall. The predominantly white surrounding school districts have experienced rapid growth, and have provided landing strips for white flights.

Prior orders of this Court designed to provide a unitary system or produce a more favorable racial balance have been thwarted by failure of white students to attend the predominantly black schools in black neighborhoods to which they were assigned. The families of these students simply moved to areas of the school district that were left unaffected by the prior orders, or to areas outside the district, many times selling their homes at great financial sacrifice. Any plan that provides safe havens, areas where residents are immune from the forced mixing or forced

busing in which the rest of the school district is required to participate, is doomed to fail before the first school bell chimes.

The Court is persuaded that the primary complaint of the black community centers on the conviction that there has not been even-handed treatment afforded blacks by way of facilities, the quality of instruction provided, and the burdens imposed by the transportation of students to improve racial balance. To put it in terms of a community member offering testimony, "it must be a two-way street."

The Court further finds that the testimony of Mr. Ed Moore, Chairman of CAC, to the effect that the preference of a majority of the CAC members and the community blacks is to leave children of tender age in their neighborhood schools, and that blacks are more interested in quality education than racial mixing, reflects the true desires of the black citizenry. The Court finds that concern on the part of CAC, as a result of conferences with Justice Department attorneys, that the Justice Department would withhold enforcement support of any Court order entered in this case if CAC did not go along with the government on the K-3 busing proposals, was a substantial cause of the posture taken by the CAC lawyers on the question of busing young children. There was unanimity of opinion from the witnesses, including Dr. Michael Stolee, the desegregation expert called by the government, that serious implementation problems exist for the fall of 1981, and that the middle grades are all that can, as a practical matter, be effectively dealt with without causing an undue amount of disruption in the coming year.

THE PROPOSED PLANS

The plan proposed by the Freedom-of-Choice Intervenors is referred to as a "freedom-of-choice" plan conceived to eliminate forced busing. The plan contains an incentive provision similar to the St. Louis plan. Essentially, the proposal permits each

student to pay $35.00 annually into a fund that, along with contributions from the private sector, would fund partial scholarships of $350.00 annually for college or vocational training for each year that a student in the middle grades participated in the majority-to-minority transfer program.

The Court has two fundamental problems with this plan. First, this Court has no intention of imposing a price on public education. Second, the Court is persuaded that the plan has minimal likelihood of success. The plan is quite similar to the "free-transfer" practice that the Supreme Court invalidated in *Munroe* v. *Board of Commissioners*, 391 U.S. 450, 88 S. Ct. 1700, 20 L.Ed.2d 733 (1968), and the free choice plan invalidated in *Green* v. *County School Board*, 391 U.S. 430, 88 S. Ct. 1689, 20 L.Ed.2d 716 (1968). The Courts have concluded that such plans amount to an implicit invitation to return to the security of the old established discriminatory patterns, and that such plans delay rather than promote conversion to unitary, nonracial, non-discriminatory systems. The Fifth Circuit in *United States* v. *DeSoto Parish School Board*, 574 F.2d 804, 818 (1978), held explicitly that "the free-choice option cannot remain in a constitutionally valid plan."

The Freedom-of-Choice plan, conceptually, is the preferable plan. Properly administered, it satisfies constitutional requirements and is compatible with the holding in *Brown* v. *Board of Education*, 347 U.S. 483, 74 S. Ct. 686, 98 L.Ed. 878 (1954). A plan that gives all students the unrestricted right, regardless of racial considerations, to attend the school of their choice, provides equal protection of the laws under the Fourteenth Amendment and produces a unitary system. However, the law has progressed from a concept of desegregation to one of integration. While the Fifth Circuit has made little pretense in this regard, the Supreme Court has avoided adopting the principle in so many words. Regardless of the rhetoric employed, however, plans that fail to produce a sufficient degree of integration are

rejected, and plans that do produce a sufficient degree of integration are approved. The closest the Courts have come to actually articulating this fact is in *Keyes* v. *School District No. 1, Denver, Colorado*, 413 U.S. 189, 200 n. 11 (1972):

> Our Brother Rehnquist argues in dissent that *Brown* v. *Board of Education* did not impose an "affirmative duty to integrate" the schools of a dual system but was only a "prohibition against discrimination" "in the sense that the assignment of a child to a particular school is not made to depend on his race. . . ." *Infra*, at 258. That is the interpretation of *Brown* expressed 18 years ago by a three-judge court in *Briggs* v. *Elliott*, 132 F.Supp. 776, 777 (1955): "The Constitution, in other words, does not require integration. It merely forbids discrimination." But *Green* v. *County School Board*, 391 U.S. 430, 437-438 (1968), rejected that interpretation insofar as *Green* expressly held that "School boards . . . operating state-compelled dual systems were nevertheless clearly charged /by *Brown II*/ with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch." *Green* remains the governing principle. *Alexander* v. *Holmes County Board of Education*, 396 U.S. 19 (1969); *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1,15 (1971). See also *Kelley* v. *Metropolitan County Board of Education*, 317 F.Supp. 980, 984 (1970).

The reason for the Court's extension of the basic right of equal protection of the laws to a posture generally considered to be in the nature of affirmative action has been the problem of implementation. The resistance of local authorities in the South, and later in the North, has produced of necessity the progeny of *Brown*. Simply stated, all deliberate speed was not employed, which ultimately compelled the Courts to resort to what are now referred to as the *Swann* guidelines. Whether this school district can, in the future, progress from the plan this Court adopts today to one that incorporates to some measure the mobility afforded by a modified freedom-of-choice plan, or to one which

embraces to a greater degree the neighborhood school concept, is a question that must be deferred.

The government's plans were presented by Dr. Michael Stolee, a recognized expert in the field of desegregation with extensive experience in the evaluation and formulation of desegregation plans. The government's proposed plans A and C utilize the concepts of pairing and clustering. Plan B is a magnet school concept which the government, after having presented early in the trial, subsequently withdrew, based on the opinion of Dr. Stolee that it would not work in South Park due to the apparent disinterest of the school board. The plans proposed by the school board and CAC embrace the same concepts of pairing and clustering to achieve racial balance and do not differ substantially from the government Plans A and C. The school board proposed to present the question to the community at an early date, by way of a bond issue, addressing the construction of a new high school located in a "neutral" territory, to be utilized along with Forest Park, creating a two high school district with comparable facilities. Each of the plans involves substantial busing to achieve racial balance. As the demographics contained in Defendant's Exhibit 31 visually demonstrate, there is no way to produce racial mixing in such a geographically segregated community without the transportation of students. The Freedom-of-Choice plan proposed by the Intervenor, opposed to forced busing, would produce, in order to be successful in achieving racial balance, just as much busing as any of the other plans devised by the parties or the Court.

The Court rejects the plans offered by the parties. They encourage white flight by creating "safe havens" in the pairing and clustering configurations. They require an excessive number of school changes for children — one plan would have some students attending seven different schools in seven years — which could be as detrimental to the quality of education in this

district, in the Court's opinion, as the phenomenon of white flight.

The magnet school concept is a variation of the freedom-of-choice plan, with special programs in the various magnet schools to encourage students to transfer out of their neighborhood. It has been utilized primarily in large metropolitan school districts thus far, such as St. Louis, Houston, Cincinnati, Chicago, Milwaukee, Philadelphia, Dallas, San Diego, Seattle, and Buffalo. Dr. Stolee testified that at the time of this hearing he had recommended a magnet plan for a school district similar in size to South Park. He further testified that although he initially discounted the prospects for success of magnet plans, his views had changed over the years, and that he now believed magnet plans *could* work, even in smaller school districts such as South Park. A magnet plan would have no chance for success, however, unless fully and enthusiastically supported by the school board in charge of implementing it. Dr. Stolee originally recommended a magnet plan for South Park, but withdrew that recommendation after he became convinced that the South Park school board would not adequately support it.

The Court is persuaded that the magnet concept alone will not produce the desired results in the South Park Independent School District for two reasons: (1) the size of the district, and (2) the lack of a strong commitment to the plan by the school board. The Court would expect to look favorably upon a voluntary consolidation of the South Park Independent School District and the Beaumont Independent School District wherein a city-wide magnet concept with proper backup could be implemented. Were such a consolidation to occur, the Court would be disposed to reconsider the incorporation of the magnet concept into a desegregation plan for the combined district.

THE ROLE OF SOCIAL SCIENCE

Dr. Stolee, in support of his recommendations to the Court of the government's plans, relied on the oft-cited and well-worn

1966 James Coleman Report. Studies in the area of school desegregation have proliferated. Dr. Stolee could easily have used studies by Crain, Orfield, Pettigrew and Green, or Robin and Bosco. The 1976 Coleman Study, and the works by Glazer, Armor, and Wolfe, have also been credited with influencing more recent court decisions.

The focus on the social scientist as a provider of useful information to the courts emanated from the basic premise of *Brown I* in 1954 that separate is inherently unequal and that positive effects flow from racial mixing, and from the reference in the now-famous Footnote 11 of the opinion to studies in existence at the time in support of that premise.

The reliance by the Supreme Court on social science to justify its decision has long been criticized. Professor Yudof, in "School Desegregation: Legal Realism, Reasoned Elaboration, and Social Science Research in the Supreme Court," 42 *Law and Contemporary Problems* 57, 70 (Autumn 1978), succinctly expresses the major flaw in that reliance.

> "Virtually everyone who has examined the question now agrees that the Court erred. The proffered evidence was methodologically unsound. The damage of the dual school system, the systematic treatment of blacks as inferior beings, is a historical and not an empirical truth."

The expert witnesses in desegregation cases across the country have a wealth of social science data available to support any position on any question germane to the subject. Such inconclusive data limits the usefulness of the testimony to the Court. The Supreme Court has elected to impose a legal presumption a school system's past de jure segregation and an unsatisfactory present statistical racial makeup in the system's schools. One-race schools existing today in districts that have not been declared to be unitary, are presumed to be vestiges of a dual system and caused by past or present discrimination. *Keyes, supra,* 413 U.S. at 211 n. 17; *Swann, supra,* 402 U.S. at 26;

Lemon v. *Bossier Parish School Board*, 566 F.2d 985, 987 (5th Cir. 1978). The genesis for that legal presumption undoubtedly lies in the Supreme Court's frustration with the failure of more tolerable remedial orders either to effectively promote integration of the schools or to reduce the disparity between the predominantly white schools and the predominantly black schools in the quality of education offered. The intellectual justification for that presumption, however, must ultimately be grounded in social science. Given the current state of the art of social science research, the validity of that presumption remains speculative.

Straightforward application of equitable principles dictates that if the constitutional violation is state-imposed segregation, the constitutional remedy should be confined to the elimination of that segregation. The body of law in the Fifth Circuit reflects the conviction that the remedy should extend to the imposition of integration. Underlying this conviction is not only the well-founded suspicion that much of the remaining racial polarization in public schools is in fact promoted by more subtle and sophisticated practices by school districts and other governmental entities, but also the feeling that separation of the races in public schools is stigmatizing and symbolic of a time when the power structure was controlled by Whites and was hostile to relatively powerless Blacks. Under this view, to the extent that integration of the public schools removes that stigma, it is a justifiable equitable remedy for segregation.

The caste system that has been part and parcel of public education must be eliminated, if for no other reason than it has consistently, in the Court's opinion, disadvantaged a significant segment of our society — the black citizen. The remedy, therefore, must strive to achieve the goal of the removal of the stigma, and the elimination of any perceived disadvantage — but no more. Vindication of even constitutional rights must know some limits, and the high costs of federalism must be balanced against

the objectives of accomplishing desegregation. The future of public education in this country may well depend on the ultimate resolution of these competing considerations. Public education should serve more of the community than those too poor to flee or attend private schools. There must remain a measure of flexibility in remedial orders in desegregation cases, and there will remain one in this case.

THE COURT'S PLAN

The plan selected by the Court randomly places each household family in the district in one of two feeder patterns for grades four through twelve, preserves neighborhood school patterns for grades K-3, and minimizes to the extent possible the number of times a student must change schools. Under the plan, a student will attend two elementary schools, one for grades K-3 and one for 4-5; one middle school, grades 6-8; and one high school, grades 9-12. Students attending full elementary schools, Bingman, Pietzsch, and Tyrrell Park, will omit the 4-5 step and, therefore, attend only three schools for their thirteen years.

The South Park Independent School District will comprise three full elementary schools (grades K-6) — Bingman, Pietzsch, and Tyrrell Park; five elementary schools (grades K-3) — Blanchette, Caldwood, Curtis, Fehl, and Regina Howell; two elementary schools (grades 4-5) — Amelia and Price; two middle schools (grades 6-7-8) — Odom and either Marshall or Vincent (both will be utilized for the fall 1981-82 term because of space limitations); and, beginning fall 1982, two high schools (grades 9-12). There shall be two coexistent feeder patterns, assignments to which shall be determined for each household family by a random selection process. Feeder pattern No. 1 shall consist of the following schools:

K-3 — Neighborhood schools

4-5 — Amelia

6-7-8 — Odom

9-12 — High School No. 1

Feeder pattern No. 2 shall consist of the following schools:

K-3 — Neighborhood schools

4-5 — Price

6-7-8 — Vincent and Marshall for 1981, to be reduced to one facility 1982

9-12 — High School No. 2

Students attending full elementary schools, Bingman, Pietzsch and Tyrrell Park, shall enter the feeder pattern at the sixth grade level. Bingman, Pietzsch, and Tyrrell Park, appear by their racial makeup to be fully desegregated in school attendance. The court, therefore, excludes these schools from the remedial order for grades 4-5, allowing them to remain intact for grades 1-5 with neighborhood attendance zones as presently constituted.

The Court recognizes that arguments in favor of neighborhood schools have merit. Substantial time spent in traveling to and from school can disrupt the educational process, particularly for children in their earliest years of school. School is generally the first occasion for a child to spend significant time away from home. A major goal of school in the early grades is to see that the child enjoys school and develops a healthy interest in learning. Close teacher supervision, to keep the child's attention occupied, is an important element in achieving this goal. During these tender and impressionable years, the child forms an attitude toward school and education that will likely remain with him. Time spent in transit to and from school is unstructured, unsupervised time. It is a period of limbo between home and school which disjoints the two environments. Moreover, parental

participation is significantly higher when their children attend neighborhood schools than when they attend schools across town. Such participation can be of major assistance to the education development of children of tender age.

Although these benefits of neighborhood schools in a child's tender years will not legitimate a constitutionally unacceptable school attendance plan, they are appropriate factors to consider when deciding among constitutionally acceptable alternative plans. Not every school in a school district must have any particular racial ratio in order for the school district to pass constitutional muster; the continued existence of some one-race schools in a desegregated school district is permissible, if their racial composition is due to non-segregative factors. Since the new plan should eliminate all vestiges of racial segregation in the district as a whole, the Court finds that the continued existence of neighborhood primary schools is permissible to the limited extent permitted by this Order.

A major influence on the Court's determination to allow neighborhood primary schools is its conviction that the remedy for grades four through twelve will effectively eliminate the effects of all past segregation. The Court is optimistic that the community will assist the school board and school officials in achieving the purposes of this order, and that no alteration of or interference with the neighborhood scheme for primary schools will be necessary. Whether such further action by this Court becomes necessary will depend on the success of this plan. Meanwhile, the majority-to-minority transfer provision of the 1970 order will remain in effect for grades K through three in Blanchette, Caldwood, Curtis, Fehl, and Regina Howell. The school district shall implement any additional incentives deemed appropriate or practical to encourage participation in the majority-to-minority transfer program.

A bi-racial committee to the school board and the Court shall be created to assist the board and the Court in the implementation of this Order. The committee shall consist of six persons, three appointed by each intervenor, with the chair of the committee rotating at each called sitting. The chair shall not have the right to vote and a quorum shall be four persons. The committee shall meet at such times and places as the committee deems necessary. The operating expenses of the committee shall be considered litigation expenses and borne by the school district for a period of one year from the date of this Order. Such expenses shall be determined and reimbursable in accordance with established accounting principles in use by the district.

To implement the new plan in the 1981-82 school year, representatives of the school district and the bi-racial committee will jointly hold a special drawing no later than August 15, 1981. Each household family with a child or children entering grades four through eleven shall participate. The special drawing shall take place at an open meeting in a location large enough to accommodate all interested citizens who may foreseeably wish to attend.

The random selection process, or drawing, shall be conducted in a manner agreed upon by and between the school district and the bi-racial committee by the utilization of a procedure that insures random selection integrity, such as the drawing of colored beads from a jury wheel. In the event the school district and the bi-racial committee cannot agree upon a proper procedure for the random selection process, upon notification to the Court, the Court shall devise a procedure to be employed. The random selection process utilized by the school district and the bi-racial committee shall designate which feeder pattern, one or two, each participating household family in the district shall be assigned.

That assignment will determine the feeder pattern which all children in each participating household family will follow

through high school. The feeder patterns will be put into operation for grades four through eight beginning in the 1981-82 school year; for grades nine through twelve, beginning in the 1982-83 school year. Students entering grades nine through twelve will remain in their present high schools for the 1981-82 school year, subject to their option to change high school under the majority-to-minority transfer program.

During the spring semester of each year, beginning in 1982, a drawing will be held for household families with children enrolled in the third grade who have not previously participated in a drawing. As with the special drawing to be held this month, the initial assignment will determine the schools that all children in the household family in grades four through twelve will attend.

Household families moving into the school district with children in grades four through twelve, and household families transferring their children in grades four through twelve from private to public schools for the first time, will be assigned a feeder pattern on a similarly random basis.

Household families with children entering grades four and five in Bingman, Pietzsch, or Tyrrell Park in this school year will participate in the special drawing, even though their children will not enter their assigned feeder pattern until grade seven. Similarly, household families with children in grade three in those schools, who have not previously participated in a drawing, will participate in the annual drawing.

The feeder pattern arrangement for grades four through twelve offers several advantages over the proposals submitted by the parties and intervenors. First, all families in the school district will share equally in the burdens as well as the benefits of the remedial plan, by participating in the random selection process on equal terms. There will be no exceptions for any family; there will be no "safe havens" within the district.

Admittedly, students in Bingman, Pietzsch, and Tyrrell Park will not leave their neighborhood school until the sixth grade; but the racial composition of those schools raises no presumption of discriminatory impact. Although proof that a racial imbalance in school attendance in one part of a school district is due to segregation raises a presumption that racial imbalance in school attendance in other parts of the district is also due to segregation, *Keyes* v. *School District No. 1, Denver, Colorado,* 413 U.S. 189, 207-13, 93 S.Ct. 2507, 37 L.Ed.2d 688 (1973), where there is no racial imbalance in school attendance, there is no vestige of segregation. Because the effects of past segregation have been cured in the Bingman, Pietzsch, and Tyrrell Park areas, and because the Court should limit its equitable remedy to fit the scope of the remaining segregative impact, those areas are appropriately excluded from the feeder pattern assignments for grades four and five.

The second advantage of this plan over other proposals is its minimal disruptive impact. Once a household family is assigned a feeder pattern, the family knows which schools its children will attend from grade four through grade twelve. Each child will attend three schools during those years. Students attending school together in grade four will continue to attend school together until graduation from high school, which will preserve the stability of friendships.* The initial disruption in this regard that will occur during the 1981-82 and 1982-83 school years,

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* Students in grades six through eight in feeder pattern number two will be divided randomly between Vincent and Marshall for the 1981-82 school year. This temporary aberration in the Court's plan is permitted in deference to expressed school board wishes to preserve the middle school grouping for grades six through eight, and to the fact that the various schools in the district were designed for particular age groups and could not easily be altered. At the December 9, 1981, hearing, the school board will present a proposal to the Court for expanding the middle school facilities so that all middle school students in each feeder pattern can attend the same school.

when students will be relocated pursuant to their families' assignments, is regrettable, but inevitable without completely frustrating the goals of this plan. The one-time disruption for children entering their assigned feeder pattern in grade four, or in grade six for students in Bingman, Pietzsch, and Tyrrell Park, is a necessary result of preserving the neighborhood attendance pattern for the earlier grades.

An oft-voiced view of the black community, as expressed both in testimony before the court and in letters from black citizens, is that black children from educationally disadvantaged backgrounds have special educational needs, and that meeting those needs requires teachers and administrators with special training and understanding that can best be provided by black teachers. The thrust of this view is that, given the opportunity to apply an educational program of its own design, the black community can achieve greater progress in laying a solid educational foundation for black children in the early grades, to prepare them effectively for education in the upper grades.

The Court is of the view that the black community should be given such an opportunity. The plan implemented by the Court should, and does, contain sufficient flexibility to permit this experiment in the pursuit of excellence. In the event the CAC elects to implement such an experimental program, the entire student body of the selected school shall be black and all teachers and administrators assigned to the experimental school shall be black. The school board should defer, if possible, to recommendations from the CAC regarding the selection of teachers and administrators to be asigned to the experimental school. The school district shall monitor the progress of the experimental program and conduct appropriate testing or other educationally acceptable means to evaluate the impact of this experimental program and its effect on children participating as compared to other children, white and black, in the district. The continued

existence of the experimental program shall be subject to further orders of the Court.

This plan complies with the school board's desire to close MacArthur Middle School, which closing is based on administrative considerations that are unrelated to the racial makeup of the student body.

The Court is scheduling a hearing for 10:00 a.m., December 9, 1981, for the school board to report to the Court whether it intends to construct a new high school or to renovate the facilities presently known as South Park High School, or Hebert High School, to serve as one of the two high schools in the plan along with the facility presently known as Forest Park High School, to serve as the other high school campus. The Court shall, at such hearing, select which high school facility shall serve Feeder Pattern No. 1 and which shall serve Feeder Pattern No. 2.

Further, the Court shall, at such hearing, entertain any motions by the parties to modify the plan.

It is so ORDERED, this, the 5th day of August, 1981.

.....

ROBERT M. PARKER
United States District Judge

APPENDIX D

Supreme Court of the United States

Nos. A-5 AND A-33

SOUTH PARK INDEPENDENT SCHOOL DISTRICT, APPLICANT,
A-5 v.
UNITED STATES. ON APPLICATIONS FOR STAY.

GERALDINE HUCH ET AL., APPLICANTS,
A-33 v.
UNITED STATES.

[July 21, 1981]

JUSTICE POWELL, Circuit Justice.

A school district in Beaumont, Tex., and a group of intervenor parents, children, and citizens have requested me as Circuit Justice to stay the mandate of the Court of Appeals for the Fifth Circuit pending disposition of their petition for a writ of certiorari. The Court of Appeals ordered the District Court to prepare and implement a desegregation plan to operate during the 1981-1982 school year. For the reasons stated below, I must deny the motion.

Much of the history of this lawsuit is set out in *South Park Independent School District* v. *United States*, 439 U. S. 1007 (1978) (REHNQUIST, J., dissenting from the denial of certiorari). In brief, prior to 1970, the applicant maintained a dual school system based on *de jure* racial segregation. In that year the District Court entered a school integration plan that was accepted by all parties. The plan established racially neutral attendance zones for each school and included a provision

allowing any student to transfer from a school where his race was in the majority to one where it was in the minority.

In 1976, the United States filed a motion for supplemental relief, alleging that a dual system still existed in fact. The District Court denied relief, holding that its 1970 order had created a unitary school system and finding that the present racial concentrations in the school district were the result of shifting residential patterns, the transfer of some pupils to private schools, and other factors beyond the control of the school district. It held that it no longer retained jurisdiction over the case and that the United States must file a new complaint if it seeks further relief.

The Court of Appeals reversed. 566 F. 2d 1221 (1978). Relying on *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U. S. 1, 26 (1971), it held that the District Court's findings were insufficient to show that the predominance of substantially one-race schools was not the result of past or present acts of intentional discrimination. The court remanded to the District Court to hold further hearings on the question whether the school district is now a unitary system. This Court denied certiorari. 439 U. S. 1007. Two Justices dissented, suggesting that the case presented an important issue whether *Pasadena City Board of Education* v. *Spangler*, 427 U. S. 424 (1976), precluded continuing jurisdiction by the District Court where all parties had acquiesced in a desegregation plan 6 years previously.

On remand the District Court held an evidentiary hearing and made findings of fact. It found that the 1970 order created a unitary school system by implementing a racially neutral attendance zone for each school and that the court was now without jurisdiction to entertain a motion for supplemental relief. The court recounted at length evidence tending to show that the "lesser percentage of desegregation that had been anticipated" was caused by demographic changes and parental

resistance. The court found no evidence that the school district had committed any act of intentional discrimination, but rather that the authorities had implemented the 1970 plan in good faith.

The Court of Appeals again reversed. — F. 2d — (1981). It held that the District Court's finding that the implementation of the 1970 order had created a unitary school system was clearly erroneous. In reaching this decision, the court compared statistics concerning the racial composition of schools in the district in the 1969 and 1979 school years. These statistics indicate that there has been little lasting progress in achieving schools with balanced pupil populations. In 1969, 15 of 20 schools in the district had student populations 90% or more of one race; in 1979, 11 of 18 still were 90% or more of one race. The percentage of blacks in the system rose from 33% in 1969 to 40% in 1979. The court held that the District Court retained jurisdiction because these figures proved that the school authorities "had failed to eliminate the continuing system wide effects of the prior discriminatory dual school system." *Id.*, at —.

The standards for granting a stay of mandate pending disposition of a petition for certiorari are well established:

> "[T]here must be a reasonable probability that four members of the Court would consider the underlying issue sufficiently meritorious for the grant of certiorari or the notation of probable jurisdiction; there must be a significant possibility of reversal of the lower court's decision; and there must be a likelihood that irreparable harm will result if that decision is not stayed." *Times-Picayune Publishing Corp.* v. *Schulingkamp*, 419 U. S. 1301, 1305 (1974) (POWELL J., in chambers).

I cannot conclude that there is a "reasonable probability" four Members of the Court will vote to grant certiorari. The issues presented by petitioners are almost identical to those presented 3 years ago, when the Court voted to deny certiorari. Indeed,

much of the school board's argument for granting a stay merely incorporates by reference JUSTICE REHNQUIST's opinion, joined by me, dissenting from the denial of certiorari at that time. Because this argument did not persuade the Court then, I cannot predict responsibly that it will persuade the Court now.

Speaking for myself, I believe that the case in its present posture merits review by this Court. The Court of Appeals, relying exclusively on statistics comparing 1969 and 1979, rejected with little explanation the District Court's finding of fact that the implementation of the consensual 1970 plan had created a unitary school system, and that the degree of segregation existing in 1980 was caused, not by any discriminatory action by the school authorities, but by demographic changes in the public school population and by private parental choice. The statistics relied on by the Court of Appeals do not address the legal effect of the implementation of 1970 order or the legal cause of the degree of present imbalance. These latter questions should determine whether the District Court retains jurisdiction over the local schools.

It seems to me that the Court of Appeals may have erred as a matter of law in failing to give appropriate recognition to the District Court's factual findings as to the cause of the lack of present integration. *Pasadena* made clear that once a unitary school system has been attained, the District Court no longer has jurisdiction to continue its oversight, respond to enevitabie demographic changes, and attempt by judicial decree to maintain for an indefinite time what it perceives to be a desirable racial mix in the schools. This is not to say, of course, that a federal court should not respond forcefully to proof of fresh or continued racial discrimination.

In sum, it seems to me that there is an impasse between the District Court and the Court of Appeals as to the meaning of our decision in *Pasadena*. This is an important question of law. For this reason, I expect to vote to grant certiorari. Yet, I cannot say

with confidence that the requisite number of other Justices will join me. Accordingly, the request for a stay is denied.

APPENDIX E

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

UNIT A

No. 80-1870

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

v.

TEXAS EDUCATIONAL AGENCY, ETC., ET AL.,

Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS

ON PETITIONS FOR REHEARING

(June 19, 1981)

Before CHARLES CLARK and RANDALL, Circuit Judges, and SHARP*, District Judge.

PER CURIAM:

IT IS ORDERED that the petitions for rehearing filed in the above entitled and numbered cause be and the same are hereby DENIED. Intervenors' alternative application for a stay is also DENIED.

ENTERED FOR THE COURT:

. . . . . .

United States Circuit Judge

. . . . . .

*District Judge of the Northern District of Indiana, sitting by designation.

APPENDIX F

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

UNIT A

No. 80-1870

UNITED STATES OF AMERICA

Plaintiff-Appellant,

v.

TEXAS EDUCATIONAL AGENCY, ETC., ET AL.,

Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS

ORDER:

(✓) The motion of *appellee, South Park Independent School District*, for the stay of the issuance of the mandate pending petition for writ of certiorari is DENIED.

( ) The motion of ..... for stay of the issuance of the mandate pending petition for writ of certiorari is GRANTED to and including ...., the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within the period above mentioned there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition

has been filed. The Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of the stay granted herein, unless the above mentioned certificate shall be filed with the Clerk of this Court within that time.

( ) The motion of ..... for a further stay of the issuance of the mandate is GRANTED to and including ....., under the same conditions as set forth in the preceding paragraph.

( ) IT IS ORDERED that the motion of ..... for a further stay of the issuance of the mandate is DENIED.

/s/ CAROLYN D. RANDALL
United States Circuit Judge

APPENDIX G

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 80-1870

UNITED STATES OF AMERICA,

Plaintiff-Appellant

VS.

SOUTH PARK INDEPENDENT SCHOOL DISTRICT, ET AL.,

Defendants-Appellees
(and Intervenors)

NOTICE OF APPEAL BY DEFENDANT-APPELLEE TO THE SUPREME COURT OF THE UNITED STATES

COMES NOW South Park Independent School District, defendant-appellee herein, and would show unto the Court that:

I

Defendant-appellee has heretofore filed with this Court its timely motion for stay of mandate, stating its intention to file application for writ of certiorari to the United States Supreme Court. Defendant-appellee's motion for stay of mandate has not yet been ruled on by this Court.

II.

In addition, in accordance with Rule 10, Rules of the Supreme Court of the United States, defendant-appellee hereby gives formal notice of appeal to the United States Supreme Court from final judgment entered by this Court on May 28, 1981; on June 19, 1981, this Court denied defendant-appellee's petition for rehearing.

III.

This appeal is taken pursuant to 28 U.S.C. 1254 (1).

IV.

The clerk of this Court is requested to prepare a transcript of the entire record in this cause, to certify the same, and to transmit it to the clerk of the U.S. Supreme Court.

V.

The following points are presented by this appeal:

1. The court of appeals erred in reversing the finding of the district court that it had no jurisdiction in the case because appellant failed to comply with the requirements of 20 U.S.C. 1758.

2. The court of appeals erred in reversing the finding of the district court that a unitary system of student desegregation was established by the court-ordered plan of August 1970.

3. The court of appeals erred in reversing the finding of the district court that it did not retain jurisdiction following entry of its desegregation order in 1970.

VI.

The following decisions by the U.S. Supreme Court, among others, support defendant-appellee's positions on these points:

1. *Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971);
2. *Milliken* v. *Bradley*, 418 U.S. 717 (1974);
3. *Washington* v. *Davis*, 426 U.S. 229 (1976);
4. *Pasadena City Bd. of Educ.* v. *Spangler*, 427 U.S. 424 (1976).
5. *Dayton Bd. of Educ.* v. *Brinkman*, 433 U.S. 406 (1977).

WHEREFORE, PREMISES CONSIDERED, defendant-appellee prays that it be found to have complied with appropriate federal statutes and with the rules of the U.S. Supreme Court in submitting its notice of appeal.

Respectfully submitted,

WELLS, PEYTON, BEARD,
GREENBERG, HUNT AND
CRAWFORD
By: .....
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Attorneys for Defendant-Appellee
South Park Independent
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CERTIFICATE OF SERVICE

I hereby certify that the foregoing notice of appeal was served by mailing copies, postage prepaid, to:

Mr. Ken Barnes
Attorney
General Litigation Section
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This 25th day of June, 1981.

.....

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Opposition

Office - Supreme Court, U.S.
FILED
NOV 18 1981
ALEXANDER L. STEVAS
CLERK

No. 81-540

In the Supreme Court of the United States

OCTOBER TERM, 1981

SOUTH PARK INDEPENDENT SCHOOL DISTRICT,
PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly determined that the South Park Independent School District has never dismantled its unconstitutionally segregated school system, although it had complied with a court-ordered desegregation plan issued before this Court refined the standards for such plans.

2. Whether the United States complied with the notice requirements of 20 U.S.C. 1758 prior to filing its motion for supplemental relief.

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In the Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-540

SOUTH PARK INDEPENDENT SCHOOL DISTRICT,
PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The district court opinion of June 1, 1980 (Pet. App. B) is not reported The court of appeals opinion of May 28, 1981 (Pet. App. A) is reported at 647 F.2d 504.

Earlier district court opinions of August 31, 1970 (App. A, *infra*) and September 9, 1976 (App. B, *infra*) are not reported. The court of appeals opinion of January 23, 1978, is reported at 566 F.2d 1221.

JURISDICTION

The judgment of the court of appeals was entered on May 28, 1981. A petition for rehearing was denied on June 19, 1981 (Pet. App. E). The petition for a writ of certiorari was filed on September 16, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The United States filed this action against the South Park Independent School District (SPISD) in 1970. Until the late 1950's, SPISD operated a dual school system pursuant to Texas law (566 F.2d 1221, 1223 n.2 (1978). When this action was filed, a "freedom of choice" system for student assignment was in effect (Pet. 3).

On August 31, 1970, the district court ordered the implementation of "a school integration plan designed to establish a unitary school system" (App. A, *infra*, 1a). No appeal was taken.

On July 19, 1976, the United States filed a motion for supplemental relief, alleging that the plan implemented pursuant to the 1970 order had not disestablished the dual system as measured by the standards articulated by this Court in *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971). On September 9, 1976, the district court denied relief (App. B, *infra*, 11a, 15a). The court held (1) that "the Court's order of August 31, 1970, desegregated the South Park Independent School District, thereby dissolving all vestiges of a dual school system" (App. B, *infra*, 14a-15a); (2) that SPISD had fully complied with the August 31, 1970 order (App. B, *infra*, 13a); (3) that "[t]he desegregative results differing from those anticipated in 1970 [were] the result of

shifting residential patterns, attendance of some district students at private schools, and other factors beyond the control of [SPISD]" (*ibid.*); and (4) that the United States had failed to comply with the requirements of 20 U.S.C. 1758 because it failed to provide SPISD adequate notice of the details of any violation of equal educational opportunity or of equal protection of the laws (App. B, *infra*, 14a).[1]

The court of appeals reversed, 566 F.2d 1221 (1978). The court determined that the district court's conclusion that SPISD was a unitary system was not detailed enough to show whether the predominantly one-race schools in the district resulted from present or past discriminatory actions by SPISD (566 F.2d at 1225). The court emphasized that no judicial finding had been made, prior to the 1976 order, that SPISD had ever achieved a unitary status (*ibid.*). The court also held that although 20 U.S.C. 1758 was inapplicable because the case had never been closed, the United States had complied with the statute's notice requirements (566 F.2d at 1225-1226).

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[1] 20 U.S.C. 1758 provides:

> Notwithstanding any other law or provision of law, no court or officer of the United States shall enter, as a remedy for a denial of equal educational opportunity or a denial of equal protection of the laws, any order for enforcement of a plan of desegregation or modification of a court-approved plan, until such time as the local educational agency to be affected by such order has been provided notice of the details of the violation and given a reasonable opportunity to develop a voluntary remedial plan. Such time shall permit the local educational agency sufficient opportunity for community participation in the development of a remedial plan.

The case was remanded "in order to determine whether or not the SPISD is in fact a 'unitary' school system" (566 F.2d at 1225). The district court was directed to scrutinize the one-race schools in SPISD under the analysis prescribed in *Swann, supra*. Petitions for certiorari filed by SPISD and intervenors were denied with two Justices dissenting (439 U.S. 1007 (1978)).

On remand, the district court again held that its 1970 order had "created a unitary system for the SPISD" (Pet. App. B-2) and that it had not explicitly retained jurisdiction of the case and thus could not consider the United States' motion for supplemental relief absent proof of subsequent constitutional violations (Pet. App. B-10 to B-13). The court again found that the SPISD had neither violated the 1970 remedial order (Pet. App. B-14 to B-16), nor taken any action subsequent to that order which would have, "as a natural and foreseeable consequence, a segregative effect" (Pet. App. B-12). The court also concluded that the United States' failure to plead and prove that SPISD had violated the right to equal educational opportunity or the right to equal protection of the laws deprived the court of jurisdiction under 20 U.S.C. 1758 (Pet. App. B-16).

The court of appeals once again reversed, holding that the district court had retained jurisdiction of the case (Pet. App. A-9). The district court's finding that SPISD had automatically become a unitary system upon the implementation of the August 1970 plan was found clearly erroneous (Pet. App. A-8), "because in fact the school system remains a dual one" (Pet. App. A-8). Based on evidence presented to the district court at the 1976 and 1979 hearings, the court of appeals concluded that SPISD's dual

system had not been dismantled by the 1970 order and that SPISD had "failed to eliminate the continuing system wide effects of the prior discriminatory dual school system" (Pet. App. A-7). The court also again reversed the district court's ruling relating to 20 U.S.C. 1758, viewing the earlier court of appeals' judgment on that point as the law of the case (Pet. App. A-3).

The case was remanded to the district court to develop, with the assistance of the parties, a new school desegregation plan to be implemented for the 1981-1982 school year (Pet. App. A-9). SPISD's motion for a stay was denied by the court of appeals on June 29, 1981 (Pet. App. F); intervenors' motions for stays were denied on June 19 and June 29, 1981 (Pet. App. E). Justice Powell denied SPISD's and intervenors' applications for a stay on July 21, 1981 (Pet. App. D).

ARGUMENT

1. The 1970 order of the district court necessarily rested on the unstated conclusion that SPISD was operating its school system in violation of the Constitution. Accordingly, SPISD was ordered to implement a plan that was "designed to establish a unitary system" (App. A, *infra*, 1a). The plan failed to accomplish that result for two reasons. First, the plan did not comport with the constitutionally required standards articulated in this Court's subsequent decisions in *Swann*, *supra*, and *Davis* v. *Board of School Commissioners of Mobile County*, 402 U.S. 33 (1971). Although the design of the 1970 plan may have conformed to the then-prevailing Fifth Circuit precedents (see, *e.g.*, *Ellis* v. *Board of Public Instruction of Orange County, Florida* (*Ellis I*), 423 F.2d 203 (1970)), the rationale of those precedents was disapproved by this Court in *Swann*

and *Davis*. Second, the plan, because of built-in deficiencies, failed to meet even its own modest desegregation goals in two all-black schools. As this Court indicated in *Davis*, *supra*, 402 U.S. at 37, the type of neighborhood school assignment plan adopted by the district court in 1970 is acceptable only if it succeeds in establishing a unitary system. The plan adopted by the district court in 1970 did not have such an effect. Therefore, the court of appeals was correct in concluding that, regardless of whether SPISD complied with the 1970 order or took no subsequent discriminatory action, it was not relieved of its constitutional obligations, because the effects of the dual system had never been eliminated. *Columbus Board of Education* v. *Penick*, 443 U.S. 449 (1979); *Dayton Board of Education* v. *Brinkman*, 443 U.S. 526 (1979).[2]

a. The effectiveness of the 1970 plan was properly evaluated by the court of appeals under the standards articulated by this Court in *Swann* even though that decision was handed down after the district court's 1970 order.[3] Indeed, *Swann* itself involved a court-

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[2] The court of appeals also correctly concluded that the district court retained jurisdiction of the case after the 1970 order for the purpose of insuring that the dual system was effectively dismantled. *Green* v. *County School Board*, 391 U.S. 430, 439 (1968). It is well established that a court of equity retains the power to modify an injunction even where there is no explicit retention of jurisdiction (*United States* v. *Swift & Co.*, 286 U.S. 106, 114 (1932)), and the fact that the United States did not appeal from the 1970 order did not foreclose it from seeking supplemental relief in 1976. *Pasadena City Board of Education* v. *Spangler*, 427 U.S. 424, 437 (1976).

[3] The court of appeals' opinion here is consistent with a number of its decisions holding that the effectiveness of school

ordered plan that was re-evaluated under similar circumstances. As this Court recently noted in *Columbus Board of Education* v. *Penick*, *supra*, 443 U.S. at 459-460, "an initial desegregation plan had been entered [in *Swann*] in 1965 and had been affirmed on appeal. But the case was reopened [on plaintiffs' motion for supplemental relief following this Court's decision in *Green* v. *County School Board*, 391 U.S. 430 (1968)], and in 1969 the school board was required to come forth with a more effective plan." In *Swann*, as here, the earlier remedial order did not fulfill the Board's constitutional obligation because it "fell short of achieving [a] unitary school system," *Swann*, *supra*, 402 U.S. at 7.

b. This Court in *Swann*, *supra*, recognized a "presumption against schools that are substantially disproportionate in their racial composition" (402 U.S. at 26), that warrants placing the burden on authorities responsible for such schools to show that pupil assignments are "genuinely nondiscriminatory" (*ibid.*). Because SPISD did not sustain this burden, the court of appeals properly reversed as clearly erroneous the district court's finding that SPISD had

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desegregation plans, even plans adopted pursuant to pre-*Swann* court orders, must be measured by the standards articulated in *Swann*. This Court has repeatedly declined to review these decisions; there is no reason for a different result in this case. See, *e.g.*, *Ellis* v. *Board of Public Instruction of Orange County, Florida* (*Ellis II*), 465 F.2d 878, cert. denied, 410 U.S. 966 (1973); *Hereford* v. *Huntsville Board of Education*, 504 F.2d 857 (1974), cert. denied, 421 U.S. 913 (1975); *United States* v. *Texas Education Agency*, 512 F.2d 896, cert. denied *sub nom. Richardson Independent School District* v. *United States*, 423 U.S. 837 (1975); *United States* v. *Columbus Municipal Separate School District*, 558 F.2d 228, cert. denied, 434 U.S. 1013 (1978); *Lee* v. *Demopolis City School System*, 557 F.2d 1053 (1977), cert. denied, 434 U.S. 1014 (1978).

become a unitary system upon the implementation of the 1970 plan. Before the plan went into effect, 15 of SPISD's 20 schools were racially identifiable (having an enrollment of 90% or more of one race) (Pet. App. A-10), and approximately 71% of all students attended these one-race schools (Pet. App. A-7), although SPISD's school population was only 33% black (*ibid.*).[4] The 1970 plan did not significantly alter this "substantially disproportionate * * * racial composition" (*Swann*, *supra*, 402 U.S. at 26) in the South Park schools. Indeed, the plan contemplated the continuation of ten one-race schools, two black and eight white.[5] The plan was thus intended to desegregate only one of the all-white schools and to leave two of six black schools all black (App. C, *infra*, 16a).[6] In fact, most of the schools that were unlawfully segregated prior to implementation of the 1970 plan remained continuously segregated for the next ten years (Pet. App. A-10). Thus, eight of

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[4] SPISD was operating under a "freedom of choice" plan. A 1969 study conducted jointly by the U.S. Department of Education and the Texas Education Agency reported (R. 26-27) that after three years of that plan's operation there were no white children attending schools originally planned for black children and only one of the schools originally planned for white children had a significant enrollment of black students. Only 16% of black students were enrolled in formerly all-white schools. Of the six identifiably black schools in 1969, five were 100% black, the sixth was 97% black (Pet. App. A-10). Of the nine identifiably white schools, seven enrolled fewer than 2% black (*ibid.*).

[5] The district court incorrectly stated (Pet. App. B-8) that the plan anticipated the retention of only two one-race schools.

[6] Of the four black schools that were to be desegregated, the black junior and senior high schools were to remain 77% and 81% black, respectively. See page 9, *infra*.

the original ten schools expected to remain one-race schools under the 1970 court order remained one-race schools (*ibid.*). The failure to desegregate those schools was built into the 1970 plan. For that reason, events subsequent to the implementation of the plan, such as changing residential patterns, white flight, attendance at private schools, and the creation of guardianships to avoid desegregation (Pet. App. B-11) simply cannot account for the racial concentrations at those schools.

The 1970 plan did not even accomplish the modest goals it was intended to achieve.[7] For example, the black junior and senior high schools, Odom Middle School and Hebert High School, never experienced less than 98% black enrollment in the ten years following the implementation of the plan (Pet. App. A-10), although they were intended to achieve 23% and 19% white enrollment, respectively (App. C, *infra*, 16a). Because Odom and Hebert remained one-race schools even during the first year of the 1970 plan's operation (App. D, *infra*, 17a), there is no merit to the district court's suggestion (Pet. App. B-12) that Odom and Hebert would have realized their projected levels of desegregation but for the gradual population shifts from white to black in the Fehl and Tyrrell Park districts.[8] To the extent that

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[7] Instead, the situation became worse. In 1969-70, 74% of SPISD's white students (6366 of 8653) were in all-white schools (Pet. App. A-10). By 1979-80, that percentage increased to 78% (4978 of 6415) (Pet. App. A-10). At the same time, the district as a whole experienced an increasing black enrollment, growing from 33% of the total in 1969-70 to 40% in 1979-80 (Pet. App. A-7).

[8] Four elementary schools, Fehl, Tyrrell Park, Blanchette and Price (formerly West Oakland), feed into Odom Middle School and Hebert High School. Blanchette and Price have always been black schools and were projected to remain so

white flight prevented Odom and Hebert from realizing any significant white enrollment, the 1970 plan fostered that result because it retained an all-white high school and an all-white junior high school (App. C, *infra*, 16a).

c. The court of appeals did not, as petitioner suggests, either accept the district court's findings of the cause of racial imbalance (Pet. 17), or determine them to be irrelevant (Pet. 14). The court of appeals correctly concluded, on the basis of the record summarized above, that the district court's findings were clearly erroneous.[9] The court of appeals held

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under the 1970 plan (App. C, *infra*, 16a). Together they had an enrollment of about 900 in 1979. In 1969 they enrolled about 1[illegible] students. By contrast, Fehl and Tyrrell Park together enrolled only 558 students in 1979 and 591 in 1969. Pet. App. A-10.

The district court's findings that residential areas changed from predominantly white to predominantly black relate only to the Fehl district and "a part" of the Tyrrell Park district (Pet. App. B-12). Fehl is the only one of the eleven racially identifiable schools in 1979 that experienced any significant change in racial composition after the implementation of the 1970 plan (Pet. App. A-10). Tyrrell Park is not racially identifiable, but its black percentage has increased significantly (8% in 1969 to 48% in 1979) (*ibid.*).

[9] The entire structure of the court of appeals opinion indicates that the court considered its decision a review of the district court's findings of fact under Fed. R. Civ. P. 52. The court first set forth the applicable standards for review under Rule 52 (Pet. App. A-4 to A-5), and then proceeded to discuss the facts of the case, reaching different conclusions from the district court about the effects of the 1970 plan and whether the school system had become unitary (Pet. App. A-5 to A-8). Even if, as petitioner claims, the court of appeals failed to specify in detail the findings it concluded were clearly erroneous under Rule 52, that is not a matter warranting this Court's review.

that the racially identifiable schools continued to exist in SPISD not (as the district court found) because of "a change in residential patterns subsequent to the implementation of the 1970 order" (Pet. App. B-11), but because "the defendants have failed to eliminate the continuing system wide effects of the prior discriminatory dual school system" (Pet. App. A-7).

Petitioner's reliance (Pet. 19-20) on *Pasadena City Board of Education* v. *Spangler*, 427 U.S. 424 (1976), is thus misplaced. The facts in that case were very different. In *Pasadena*, the district court's original desegregation order required that no school in the system enroll a majority of minority students. In the first year of operation under the order the school system met this standard; the next year, one school enrolled more than 50% black students, and four years later, five of Pasadena's 32 schools enrolled more than 50% black students (427 U.S. at 428, 431). The shifts in the racial makeup of these schools were found to be produced by the "quite normal pattern of human migration result[ing] in some changes in the demographics of Pasadena's residential patterns" (*id.* at 436). Because the Pasadena plan had effectively desegregated every school in the district, this court found it impermissible for the district court subsequently to order further alignment of attendance boundaries in order to maintain a permanent racial balance.

Unlike the Pasadena plan, however, the 1970 SPISD plan did not "fully perform[] its function of providing the appropriate remedy for previous racially discriminatory attendance patterns" (*Pasadena, supra*, 427 U.S. at 437). At no time were even the modest objectives of the 1970 SPISD plan fully met. Schools in SPISD remained one-race schools because the 1970 plan never effectively desegrated them, not because of shifting residential patterns.

This case, accordingly, does not present a situation where SPISD is being improperly "required to make year-by-year adjustments of the racial composition of student bodies once the affirmative duty to desegregate has been accomplished" (*Swann* v. *Charlotte-Mecklenburg Board of Education*, *supra*, 402 U.S. at 32). The court of appeals recognized (Pet. App. A-8 to A-9) that limitation on court intervention.[10] Here, however, the "affirmative duty to desegrate" has yet to be accomplished and, as in *Swann*, further judicial relief was properly found necessary. SPISD remains obligated to eliminate the dual system. *Dayton Board of Education* v. *Brinkman*, *supra*; *Columbus Board of Education* v. *Penick*, *supra*. The court of appeals did not, as petitioner suggests (Pet. 17), order the creation of a "totally racially balanced school system" but simply ordered (Pet. App. A-9) the development and implementation of a constitutional desegregation plan.

2. The court of appeals correctly determined that the United States complied with the notice requirements of 20 U.S.C. 1758. In a letter dated April 15, 1976, the United States advised SPISD that "additional steps" were necessary "to bring the district into compliance with federal law." The letter went on to identify specific one-race schools and to suggest

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[10] The Fifth Circuit has not required that school systems once found in violation of the Constitution must remain forever under the jurisdiction of federal district courts. In situations where one-race schools remain, but where the school system "has been effectively desegregated and is unitary and [the] one-race schools are the products of geography and demography alone" (*Stout* v. *Jefferson County Board of Education*, 537 F.2d 800, 803 (5th Cir. 1976)), the court of appeals has denied further relief. See also *Calhoun* v. *Cook*, 522 F.2d 717 (1975); *Lee* v. *Macon County Board of Education*, 584 F.2d 78 (1978).

that feeder patterns were at least partially responsible. The obvious import of the letter is that the continued operation of the one-race schools was not in compliance with federal law. The statute does not require that any specific language be used. Whether the United States' allegations were correct was, of course, a matter for litigation, but there is no doubt that the letter provided adequate notice.[11] The district court appeared to recognize as much in its 1980 order (Pet. App. B-16); it emphasized that lack of notice was not the basis for its conclusion that the United States had failed to comply with 20 U.S.C. 1758. It relied instead on its determination that the United States had failed to plead and prove a constitutional violation, concluding solely on that basis that it had no jurisdiction to modify the earlier court-ordered plan. That underlying determination was incorrect, for the reasons explained above.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 1981

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[11] The United States' motion for relief was not filed until after the school district responded to the United States' letter and indicated that the school district would not consider further desegregation for at least one full school year. See 566 F.2d at 1226.

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS BEAUMONT DIVISION

UNITED STATES OF AMERICA, PLAINTIFF

v.

SOUTH PARK INDEPENDENT SCHOOL DISTRICT, DEFENDANT

Civil Action No. 6819

ORDER FOR IMPLEMENTATION OF SCHOOL INTEGRATION PLAN

The Court having heard testimony in open hearing and having considered the arguments of counsel for the United States of America and for Defendant South Park Independent School District with respect to the immediate implementation of a school integration plan designed to establish a unitary school system in South Park Independent School District,

It is ordered that the Board of Trustees of South Park Independent School District proceed to implement, not later than September 2, 1970, the following desegregation plan:

DESEGREGATION OF STUDENTS

The neighborhood School Plan submitted by the district is hereby adopted by the Court, with certain modifications designed to increase the overall percentage of integration at particular schools while conforming more exactly to the appropriate capacities of those schools.

Senior High Schools:

1. Forest Park High School (grades 9-12)—All students in the district residing west of Interstate 10 will attend Forest Park High School.

2. Hebert High School (grades 9-12)—All students in the district residing east of Interstate 10 to the intersection of Washington Boulevard and Waco Street, and west of a line extending south on Waco Street to Southerland Street; east on Southerland Street to Marie Street; south on Marie Street to Rena Street; east on Rena Street to Opal Street; south on Opal Street to Virginia Street; west on Virginia Street to Beale Street; south on Beale Street and along a line due south across Loop 251 to an intersection with the Beaumont city limit line, and along a line due south to an intersecting point with the southernmost boundary line of South Park Independent School District; all students whose residences face toward Opal Street within this school attendance area will attend South Park High School; all students whose residences face toward Beale Street within this attendance area will attend Hebert High School; all students whose residences are located on the west side of Waco and Marie Streets within this attendance area will attend Hebert High School; all students whose residences are located on the east side of Waco and Marie Streets within this attendance area will attend South Park High School; all students whose residences are located on the north side of Southerland, Virginia, and Rena Streets within this attendance area will attend South Park High School; all students whose residences are located on the south side of Southerland, Virginia and Rena Streets within this attendance area will attend Hebert High School.

3. South Park High School (grades 9-12)—All students in the district residing east of the Hebert High School attendance line, including Hildebrandt Road and the Cardinal Meadows addition, will attend South Park High School.

Junior High Schools:

1. Memorial Junior High Schol (grades 6-8)—All students in the district residing within the following described area will attend Memorial Junior High School: All students in Grades 6, 7 and 8 who live in the area described as beginning at Calder Avenue and the District's eastern line, proceeding west on Calder Avenue to Dowlin Road, then north on Dowlin Road to Ivanhoe, extending Ivanhoe west slightly northwest of Evangeline Drive to intersection with Major Drive, proceeding north on Major Drive to the South Park Independent School District district line, including all who live on Major Drive; the east and south boundary line of this area shall be Interstate 10.

2. Marshall Junior High School (grades 6-8)—All students in the district residing north of the boundary line describing the Memorial Junior High School attendance area will attend Marshall Junior High School.

3. Odom Junior High School (grades 6-8)—All students in the district residing within the Hebert High School attendance area described above will attend Odom Junior High School.

4. MacArthur Junior High School (grades 7-8)—All students in the district residing within the South Park High School attendance area described above will attend MacArthur Junior High School.

Elementary Schools:

1. West Oakland Elementary School (grades 1-5)—All students in the district residing within an area described as beginning at Washington Boulevard and south on Fannett Road to the Loop, then west and north on the Loop to where Roberts Avenue would intersect, then east on Roberts Avenue to Fourth Street, south on Fourth Street to the point of beginning, will attend West Oakland Elementary School. All 6th grade students in this attendance area will attend Fehl Elementary School.

2. Fehl Elementary School (grades 1-6)—All students in the district residing within the area bounded by Roberts Avenue, Interstate Highway 10, T.&N.O. Railroad tracks and Fourth Street will attend Fehl Elementary School.

3. Caldwood Elementary School (grades 1-5)—All students in the district residing within the area described as beginning at the point where Interstate 10 crosses the T.&N.O. railroad tracks and proceeding south on Interstate 10 to the Caldwood cutoff, following Caldwood cutoff west and north to Hooks Street, following Hooks Street east and north to the District boundary line, said area to include all of Ida Reed Addition, will attend Caldwood Elementary School.

4. Sallie Curtis Elementary School (grades 1-5)—All students in the district residing within the area described as beginning at Calder Avenue at the point where it intersects the Caldwood cutoff, proceeding west on Calder to Dowlin Road, then proceeding on Dowlin Road to Prutzman Road, then west on Prutzman to Shakespeare, then due north to Gladys, then east on Gladys to Central Drive, which is the east boundary line of the school district, said

attendance zone to include all students living in Audubon Place, and on Sheridan, Candlestick and Fenwich Streets, will attend Sallie Curtis Elementary School.

5. Regina-Howell Elementary School (grades 1-5)—All students in the district residing within the area north of the northern boundary line of the Sallie Curtis attendance area and east of Dowlin Road to the school district line will attend Regina-Howell Elementary School.

6. Amelia Elementary School (grades 1-5)—All students in the district residing in an attendance zone identified so as to include all areas west of the previously described elementary attendance zones and to the school district boundary line, south to Walden Road and to include Walden Road, will attend the Amelia Elementary School.

7. Tyrrell Park Elementary School (grades 1-6)—All students in the district residing in the area lying west of the Bingman Elementary School neighborhood boundary line and south of Loop 251 and Interstate 10 and Walden Road, but not including Walden Road, will attend Tyrrell Park Elementary School.

8. Giles Elementary School (grades 1-6)—All students in the district residing in the area described as beginning at the intersection of the T.&N.O. railroad tracks and Washington Boulevard, proceeding east on Washington Boulevard to Highland Avenue, then south on Highland to Elgie Street, west on Elgie to Kenneth Street, south on Kenneth to Brockman Street, west on Brockman to Ector Street, south on Ector to Essex Street, west on Essex to the T.&.N.O. railroad tracks, north on the T.&N.O. railroad tracks to the point of beginning, will attend Giles Elementary School.

9. Pietzsch Elementary School (grades 1-6)—All students in the district residing in the area described as beginning at the Neches River, at the South Park school district line, and proceeding south along Sycamore Street to KCS railroad tracks, then west to the intersection of Port Arthur Highway and Highland Avenue, along Highland south to Elgie Street, west on Elgie to Kenneth Street, south on Kenneth to Brockman Street, west on Brockman to Ector Street, south on Ector to Essex Street, west on Essex to the T.&N.O. Railroad tracks, south on the T.&N.O. railroad to Virginia Street, east on Virginia to Kenneth Street, south on Kenneth to Shell Street, east on Shell (which street later becomes Alabama Street), and then east to a point beyond the Port Arthur Highway to the eastern boundary line of the South Park School District, will attend Pietzsch Elementary School.

10. Bingman Elementary School (grades 1-6)—All students in the district residing in the area described as south of the Pietzsch Elementary School boundary line and east of the Blanchette Elementary School boundary line, hereinafter described, and bounded on the north by Shell, Alabama, Virginia and Kenneth Streets, bounded on the west by Flamingo Street extended to Florida Street, east on Florida to City of Beaumont limit line, south to the South Park school district boundary line, including all of Hilderbrandt Road, then east to the eastern boundary line of the South Park Independent School District, will attend Bingman Elementary School.

11. Blanchette Elementary School (grades 1-4)—All students in the district residing in the area described as beginning at the Fannett Road and Washington Boulevard, south along Fannett Road to Loop 251, east on Loop 251 to Florida Street, east on

Florida to a point directly south of Flamingo, from that point north to Florida and Virginia, east on Virginia to the T.&N.O. railroad tracks, north on the T.&N.O. railroad tracks to Washington, west on Washington to the point of beginning, will attend Blanchette Elementary School. All 5th grade students residing within the Blanchette attendance area will attend either Caldwood, Curtis, Regina-Howell or Amelia Schools, as the school district shall direct.

Majority-to-Minority Transfer Policy:

The only general exception to the neighborhood school assignment system shall be the majority-to-minority transfer policy as defined by recent appellate decisions. That is, the school district shall permit a student attending a school in which his race is in the majority to choose to attend another district in which his race is in the minority. Moreover, all students so transferring shall be given transportation, if they desire it, assuming such transportation is available from district-controlled sources. Further, such transferees must be given priority for space at any district school to which they elect to transfer, not merely at the next closest school in which their race is in the minority.

Graduating Seniors:

Inasmuch as this litigation was initiated only a short time prior to the beginning of the Fall school term and because of the inconvenience and expense to parents whose children will be high school seniors in the 1970-71 school year, the single special exception to the neighborhood school assignment system will be to allow all students who will be graduating seniors in the 1970-71 school term to elect to attend

the district high school which they attended at the conclusion of the 1969-70 school term. This special exception will also apply to residents of other school districts whose children attended South Park district high schools at the conclusion of the 1969-70 term; who will be seniors in South Park district high schools in the 1970-71 term; and who had completed all necessary transfer requirements into South Park district prior to June 1, 1970.

DESEGREGATION OF FACULTY AND STAFF

All principals, assistant principals, teacher, teacher aides, coaches and other staff who work directly with students in one of the district schools on a day-to-day basis shall be assigned so that in no case will the racial composition of a staff indicate that a school is intended for black students or white students. For the 1970-71 school year South Park Independent School District will assign its staff as described above so that the ratios of black to white teachers and staff in each district school are substantially the same as the present district-wide ratio of faculty and staff, allowing a five (5%) percent tolerance factor. Moreover, in the event special certification requirements at the senior high school level make it impossible to meet this ratio test with the present faculty, the school district will in the course of employing new teachers during the school year act so as to correct any deviations presently existing with respect to such ratio.

/s/ JOE J. FISHER
United States District Judge

Date: August 31, 1970.

APPENDIX B

IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE EASTERN DISTRICT OF TEXAS BEAUMONT DIVISION

UNITED STATES OF AMERICA, PLAINTIFF

v.

SOUTH PARK INDEPENDENT SCHOOL DISTRICT, DEFENDANT

Civil Action No. 6819

ORDER

On August 31, 1970, this Court entered an order for implementation of a school integration plan in the cause above numbered and styled. Such order provided for the immediate desegregation of students under a comprehensive neighborhood school plan by means of specific attendance zones encompassing three high schools, four junior high schools, and eleven elementary schools.

The order also established, as the only "general exception" to the neighborhood school assignment system, a majority-to-minority transfer policy, wherein a student attending a school in which his race was in the majority could elect to attend another district school in which his race was in the minority. Students electing such transfer were to be given transportation if they desired it, assuming the same was available from district-controlled sources. Further, such transferees were to be given priority for space in any district school to which they elected

to transfer under the majority-to minority exception, not merely in the next closest district school at which their race was in the minority.

Finally, the order provided for the immediate desegregation of faculty and staff of the district in such a way as to assure that the ratios of black teachers and staff to white teachers and staff in each district school would be substantially the same as the then existing district-wide racial ratio of faculty and staff, allowing a five percent tolerance factor.

The order of the Court filed August 31, 1970, became final without appeal.

By letter of April 15, 1976, the Department of Justice wrote to counsel for the school district advising that, in the opinion of that office, "additional steps need to be taken in order to bring the district into compliance with Federal law." The Department of Justice requested that such "additional steps"—otherwise unspecified—be implemented with the beginning of the 1976-77 academic school year. Such letter contained the first indication of dissatisfaction by an agency of plaintiff since entry of the order on August 31, 1970.

Following a preliminary study of the educational and economic effects of attempting to implement a comprehensive new plan of student integration in the 1976-77 academic school year, counsel for the school district, at the discretion of its board of trustees, wrote to the Department of Justice by letter of June 24, 1976, pointing out that full consideration and implementation of an acceptable alternate plan for student integration could not be accomplished in the brief time remaining without seriously disrupting the district's educational program for academic school year 1976-77. However, the board proposed a timetable wherein it would determine, by Febru-

ary 15, 1977, the most educationally sound and economically feasible plan for accomplishing student integration in the district, which plan would be implemented with the beginning of academic school year 1977.

The Department of Justice made no direct response to defendant's letter of June 24, 1976. However, on July 19, 1976, plaintiff filed a motion for supplementary relief, with memorandum attached, seeking entry of order requiring defendant to "develop, adopt and implement a comprehensive school desegregation plan"—again unspecified. As in the initial proceedings, this Court has jurisdiction of the parties and over the subject matter of this litigation.

On July 29, 1976, defendant filed reply, with memorandum attached, to plaintiff's motion, praying that such motion be in all things denied, on the grounds that plaintiff's motion was not predicated on current information pertaining to student integration in the district; that the district has been in full compliance with the Court's order of August 31, 1970, since date of entry, which order carried plaintiff's approval; that plaintiff had consistently approved defendant's implementation of that order since its entry; that desegregative results, if any differing from those anticipated in 1970 were the result of changed residential patterns beyond defendant's control; that since 1970 defendant has taken no affirmative action with segregative intent, nor refrained from taking any action within the scope of the order which, if taken, would have increased desegregative results; and that the 1970 order promulgated the most educationally sound and constitutionally acceptable student integration plan presently available to defendant.

In the alternative, defendant's reply prayed that, in the event the Court found merit in plaintiff's motion for supplementary relief, defendant would be permitted to defer implementation of any new student integration plan until the beginning of academic school year 1977-78. Defendant's memorandum contained several reasons in support of its alternative plea.

Simultaneouly with its reply, defendant filed request for oral hearing in order to adduce evidence by testimony in open court. By date of August 5, 1976, this Court entered order granting defendant's request for oral hearing and setting the same for August 16, 1976.

On August 11, 1976, motion to intervene as interested parties, together with complaint in intervention, was filed by counsel on behalf of certain named parents and students of defendant district, and of others similarly situated, which motion and complaint urged denial of plaintiff's motion on various grounds.

Hearing in open court was conducted on August 16, 1976. Counsel for the parties, including intervenors, argued their positions. The Court deferred ruling on plaintiff's motion until plaintiff had been given an opportunity to amend its motion.

On August 17, 1976, plaintiff filed its opposition to the motion to intervene, as well as its amended motion for supplementary relief, with memorandum attached. On that same day, intervenors filed a supplementary motion to intervene. Plaintiff's amended motion no longer sought relief to be effective with the beginning of the 1976-77 academic school year, but, rather, with the beginning of the Spring Term 1977.

On August 19, 1976, hearing on plaintiff's motion was reconvened. Additional arguments by counsel were heard, as was the testimony of several witnesses called by defendant. Neither plaintiff nor intervenors offered witnesses.

After a consideration of the foregoing, the Court finds that defendant district has not been provided notice of the details of any violation of equal educational opportunity or of equal protection of law, and further that plaintiff has neither alleged nor proved specific instances or examples of denial of these rights to any person by defendant district. Without such notice defendant has not been permitted sufficient opportunity for community participation in the development of a remedial student integration plan as sought by plaintiff.

The Court further finds that defendant district has fully complied with this Court's order of August 31, 1970, from date of entry to the present.

The Department of Health, Education and Welfare, an agency of plaintiff charged with such responsibility, has approved student integration procedures in defendant district in each academic school year from entry of the Court's order to the present, and prospectively, for academic school year 1977-78.

While specific desegregative effects anticipated at the time of entry of the Court's order in August, 1970 may not have been fully realized, nonetheless, the overall, district-wide desegregative effects of that order have been greater than were anticipated. The desegregative results differing from those anticipated in 1970 have been the result of shifting residential patterns, attendance of some district students at private schools, and other factors beyond the control of defendant, particularly in the Hebert High

School and Odom Junior High School neighborhood attendance zones.

Since entry of this Court's order of August 31, 1970, defendant district has taken no affirmative action with segregative intent, nor has it deliberately refrained from taking any affirmative action within the scope of such order which, if taken, would have increased desegregative results. Student assignments to individual classes at South Park High School and in the other schools of defendant district have consistently been made without regard to race, color or national origin, and the method of student class assignment employed by defendant has had a definite desegregative effect.

No state agency has attempted to alter the residential or demographic patterns affecting the neighborhood attendance plan set forth in that order since entry of the 1970 order.

In each academic year since entry of the 1970 order, student enrollment district-wide has consistently declined. Further, during that six-year interval the percentage of black students enrolled in defendant district has increased from about thirty-three percent to about forty percent.

Plaintiff has failed to satisfy the requirements of 20 U.S.C.A. 1758 with respect to providing notice to defendant district of the details of any violation of equal educational opportunity or of equal protection of law. Thus, defendant has not been given a reasonable opportunity to develop a voluntary remedial integration plan with time for community participation therein. Accordingly, this Court is prohibited under the provisions of 20 U.S.C.A. 1758 from granting plaintiff's motion for supplementary relief.

Further, the Court's order of August 31, 1970, desegregated the South Park Independent School Dis-

trict, thereby dissolving all vestiges of a dual school system. The resultant and now existing unitary system complies with the constitutional requirements enunciated in *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971).

No action, or inaction, by defendant district since entry of this Court's order on August 31, 1970, has had, as a natural and foreseeable consequence, a segregative effect on student integration. Therefore, no further action by this Court is required. *Pasadena City Board of Education* v. *Spangler*, —— U.S. —— (1976); *Stout* v. *Jefferson County Board of Education*, —— F.2d ——, (5th Cir. 1976, No. 75-2978).

Plaintiff has failed to establish that the integration order entered by this Court on August 31, 1970, is constitutionally flawed. Thus, the Court hereby reaffirms the constitutionality of that order and must direct defendant district to continue to comply with such order in all particulars.

It is accordingly ORDERED, ADJUDGED and DECREED that plaintiff's Motion for Supplementary Relief, as amended, be, and the same is hereby DENIED.

RENDERED this the 19th day of August, 1976.

/s/ JOE J. FISHER
United States District Judge

[Order entered September 9, 1976.]

APPENDIX C

Under the court order, the SPISD schools were to be organized as follows with the following anticipated enrollment:

SCHOOL	W	B	%B	TOTAL
Forest Park High	1660	26	2	1686
Hebert High	222	950	81	1172
South Park High	855	329	28	1184
MacArthur J.H.S.	383	237	38	620
Marshall J.H.S.	689	0	0	689
Vincent J.H.S.	877	21	2	898
Odom J.H.S.	159	530	77	689
Amelia	934	11	1.2	945
Bingman	340	91	21	431
Blanchette	0	476	100	476
Caldwood	376	3	.07	379
Curtis	483	4	.08	487
Fehl	183	273	59	456
Giles	120	185	60	305
Pietzsch	436	176	28	612
Howell	353	0	0	353
Tyrrell	277	18	6.1	295
W. Oakland	39	518	92.9	557
TOTALS	8386	3848	31.4	12,234

Source: Government Exhibit No. 17.

APPENDIX D

STUDENT ENROLLMENT

1970-71

SCHOOL	Black	White	Total	%B
MacArthur Jr. High	187	420	607	30.8
Marshall Jr. High	0	148	148	0.0
Memorial Jr. High	19	805	824	2.3
Odom Jr. High	650	12	662	98.1
Vincent Jr. High	—	—	—	—
Total	856	1385	2241	38.1
Forest Park High	24	1733	1757	1.3
Hebert High	1220	4	1224	99.6
South Park High	166	963	1129	14.7
Total	1410	2700	4110	34.3
GRAND TOTAL	4326	7728	12,054	35.8

STUDENT ENROLLMENT

1970-71

SCHOOL	Black	White	Total	%B
Amelia	44	982	1026	4.2
Bingman	111	382	493	22.5
Blanchette	590	0	590	100.0
Caldwood	36	443	479	7.5
Sallie Curtis	40	494	534	7.4
Fehl	324	81	405	80.0
Giles	158	161	319	49.5
Hollywood	—	—	—	—
Howell	29	423	452	6.4
Odom	—	—	—	—
Pietzsch	146	408	554	26.3
Price	—	—	—	—
*Southerland	136	37	173	78.6
Tyrrell	22	227	249	8.8
West Oakland	424	5	429	98.8
Total	2060	3643	5703	36.1

*Head Start

Source: Gov. Ex. 1—pp. 3-4.

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